82-1247

No. 82-____



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN IRON AND STEEL INSTITUTE, *et al.*,
AMERICAN PETROLEUM INSTITUTE, *et al.*,
CHEMICAL MANUFACTURERS ASSOCIATION,
GENERAL MOTORS CORPORATION, and
RUBBER MANUFACTURERS ASSOCIATION,
*Petitioners*,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
CITIZENS FOR A BETTER ENVIRONMENT, INC., and
NORTHWESTERN OHIO LUNG ASSOCIATION, INC.,
ANNE M. GORSUCH, ADMINISTRATOR,
U.S. ENVIRONMENTAL PROTECTION AGENCY,
*Respondents*.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## QUESTIONS PRESENTED

Part D, Title I of the Clean Air Act requires new or modified major stationary "sources" of pollutants located in regions not meeting ambient air quality standards to be subjected to stringent preconstruction review and permit-issuance requirements. In 1980, the Environmental Protection Agency ("EPA") issued regulations under Part D which defined, and required the states to define, a "source" as both an entire plant *and* each installation or piece of process equipment within the plant. In 1981, after extensive rule-making and consideration of comments from the public and the states, EPA revised its 1980 regulations by (a) adopting a definition of "source" as the overall plant and (b) allowing the states to choose between the prior "dual" definition or the revised plantwide definition so long as Clean Air Act requirements would be met. EPA also rescinded provisions which required "reconstructed" facilities in nonattainment areas to undergo new source review as if they were new sources. In the decision below, the United States Court of Appeals for the District of Columbia Circuit vacated EPA's revised regulations. The questions presented are:

1. Whether the decision of the court of appeals is contrary to this Court's holdings in *Train* v. *NRDC*, 421 U.S. 60 (1975), and *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976), that EPA must approve a state implementation plan if it demonstrates timely attainment of air quality standards, regardless of the means chosen by the state to achieve attainment.

2. Whether, contrary to this Court's holding in *Train* v. *NRDC*, 421 U.S. 60 (1975), the court of appeals wrongfully substituted its policy judgment for that of the Environmental Protection Agency and the states as to (a) an appropriate definition of "source" to be used in determining whether regulatory requirements apply to industrial facilities constructed or modified in areas which do not meet ambient air quality standards and (b) whether those requirements should be applied to "reconstructed" facilities.

3. Whether a federal agency's burden to justify revision of a rule or a portion thereof should be substantially greater than the agency's burden to support its initial promulgation of the rule.

## LIST OF PARTIES BELOW

The Natural Resources Defense Council, Inc. (NRDC), Citizens For A Better Environment, Inc., and the Northwestern Ohio Lung Association, Inc. were petitioners in the proceedings below. Respondent below was Anne M. Gorsuch, Administrator, U.S. Environmental Protection Agency (EPA). The American Iron and Steel Institute and seven of its member companies,[1] the American Petroleum Institute and 14 of its member companies,[2] the Chemical Manufacturers Association, General Motors Corporation, the Rubber Manufacturers Association and a group[3] of 81 electric power generating

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[1] Allegheny Ludlum Steel Corporation, Armco Inc., Bethlehem Steel Corporation, Carpenter Technology Corporation, Inland Steel Company, Jones & Laughlin Steel Corporation, Republic Steel Corporation, and United States Steel Corporation.

[2] Chevron U.S.A., Inc., Atlantic Richfield Company, Exxon U.S.A., Inc., Continental Oil Company, Exxon Corporation, Gulf Oil Corporation, Marathon Oil Company, Mobil Oil Corporation, Phillips Petroleum Company, Shell Oil Company, Standard Oil Company (Indiana), Texaco Inc., The Standard Oil Company (Ohio), and Union Oil Company of California.

[3] Alabama Power Company, Appalachian Power Company, Arizona Public Service Company, Baltimore Gas and Electric Company, Boston Edison Company, Carolina Power & Light Company, Central and South West Corporation, Central Power and Light Company, Public Service Company of Oklahoma, Southwestern Electric Power Company, West Texas Utilities Company, Central Hudson Gas & Electric Corporation, Central Illinois Light Company, Central Illinois Public Service Company, Central Maine Power Company, The Cincinnati Gas & Electric Company, Columbus and Southern Ohio Electric Company, Commonwealth Edison Company, Consolidated Edison Company of New York, Inc., Consumers Power Company, The Dayton Power and Light Company, Delmarva Power & Light Company, The Detroit Edison Company, Duke Power Company, Florida Power Corporation, Florida Power & Light Company, Georgia Power Company, Gulf Power Company, Gulf States Utilities Company, Houston Lighting & Power Company, Illinois Power Company, Indiana & Michigan Electric Company, Indianapolis Pow-

companies and two electric utility trade associations were intervenor-respondents below.[4]

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er & Light Company, Iowa-Illinois Gas and Electric Company, Iowa Power and Light Company, Iowa Public Service Company, Kansas City Power & Light Company, Kentucky Power Company, Kentucky Utilities Company, Madison Gas and Electric Company, Mississippi Power Company, New Orleans Public Service Inc., Mississippi Power & Light Company, Monongahela Power Company, Nevada Power Company, New England Power Company, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Northeast Utilities Service Company, The Connecticut Light and Power Company, The Hartford Electric Light Company, Holyoke Water Power Company, Western Massachusetts Electric Company, Northern Indiana Public Service Company, Ohio Edison Company, Pennsylvania Power Company, Ohio Power Company, Ohio Valley Electric Corporation, Oklahoma Gas and Electric Company, Pacific Gas and Electric Company, Pennsylvania Power & Light Company, The Potomac Edison Company, Potomac Electric Power Company, Public Service Company of Indiana, Inc., Public Service Electric and Gas Company, Rochester Gas and Electric Corporation, Salt River Project, San Diego Gas & Electric Company, Southern California Edison Company, Tampa Electric Company, Texas Utilities Generating Company, Toledo Edison Company, Tucson Electric Power Company, Union Electric Company, Virginia Electric and Power Company, West Penn Power Company, Wisconsin Electric Power Company, Wisconsin Power and Light Company, Wisconsin Public Service Corporation, the Edison Electric Institute, and the National Rural Electric Cooperative Association.

[4] In accordance with Rule 28.1 of the Rules of the Supreme Court, the parent companies, non-wholly owned subsidiaries and affiliates of each corporate party upon whose behalf this Petition is filed are set forth in the Appendix hereto beginning at 34a.

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ANNE M. GORSUCH, ADMINISTRATOR,
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*Respondents*.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The American Iron and Steel Institute, *et al.*,[5] respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the case of *Natural Resources Defense*

[5] Petitioners are the intervenor-respondents below, who are listed at pages iii-iv and nn. 1-3 *supra*, except for the group of 81 electric power generating companies and two electric utility trade associations there set forth, who do not join in this Petition, and except for Chevron U.S.A., Inc., which has filed its own petition in number 82-1005. *See* note 6 *infra*.

*Council, Inc., et al.*, v. *Gorsuch, et al.*, No. 81-2208, on August 17, 1982.

## OPINIONS BELOW

The opinion of the court of appeals is reported at 685 F.2d 718 and is reprinted in the appendix to the petition in No. 82-1005 ("Chev. App.") at A-1 - A-20, which is incorporated by reference herein.[6] The Environmental Protection Agency's final regulation and statement of basis and purpose are published at 46 Fed. Reg. 50766 (October 14, 1981) and relevant portions are reprinted in the Appendix to this Petition at 19a-32a.

## JURISDICTION

The opinion and judgment of the court of appeals was entered on August 17, 1982. *See* Chev. App. at A-1 - A-20. Timely petitions for rehearing and suggestions for rehearing *en banc* were denied by orders of the court of appeals entered on October 27, 1982. *See* Chev. App. at B-22 - B-25. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTES AND REGULATIONS INVOLVED

This case involves sections 101, 107, 110, 111, 171, 172, 173, 302, and 307 of the Clean Air Act, as amended, 42 U.S.C. §§ 7401, 7407, 7410, 7411, 7501, 7502, 7503, 7602, and 7607. The pertinent provisions of these sections together with the regulations at issue herein are set forth in the Appendix hereto at 1a-10a, 19a-33a.

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[6] The petition in No. 82-1005, Chevron U.S.A., Inc. v. Natural Resources Defense Council, et al. ("Chev. Pet."), is from the same judgment of the court below which is the subject of this petition. Because we believe that the Court should grant review in No. 82-1005, which presents essentially the same questions as the present petition, we shall not file a separate response in that case.

## STATEMENT OF THE CASE

This case involves the scope of EPA's—and each state's—authority to define the term "source" for purposes of determining whether a new or modified industrial plant, or portion thereof, is subject to preconstruction review under Part D of Title I of the Clean Air Act, 42 U.S.C. §§ 7401, *et seq.* EPA regulations which adopted, and allowed (but did not require) the states to adopt, a definition of "source" as an entire plant were vacated by the court below. The vacated definition allowed industrial plants to modernize and to respond quickly to changing market conditions while encouraging plant managers to develop innovative means for improving air quality.

In 1977 Congress enacted comprehensive amendments to the Clean Air Act, adding, *inter alia*, Part D of the Act which applies to "nonattainment areas"—areas identified by the states pursuant to Section 107(d) of the Act, 42 U.S.C. § 7407(d), as not meeting one or more national ambient air quality standards.[7] The purpose of Part D is to ensure the attainment of the ambient air standards in these nonattainment areas by specified dates. To this end, Part D requires the states, for each nonattainment area within their borders, to prepare an implementation plan ("State Plan") containing regulatory requirements that will lead to timely attainment of those standards. Section 172(a), 42 U.S.C. § 7502(a). EPA must approve each such State Plan if it demonstrates, among other things, attainment of the ambient air standards by the statutory deadlines and, in the interim, "reasonable further progress" toward attainment of those standards.[8] Section 172, 42 U.S.C. § 7502.

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[7] National ambient air quality standards are promulgated under Sections 108 and 109 of the Clean Air Act, 42 U.S.C. §§ 7408, 7409. Ambient air standards are in effect for six pollutants: sulfur oxides, particulate matter, carbon monoxide, nitrogen oxides, photochemical oxidants (expressed as ozone), and lead.

[8] The Act defines "reasonable further progress" as "annual incremental reductions in emissions of the applicable air pollutant . . . ." Section 171(1), 42 U.S.C. § 7501(1). This requirement pre-

State Plans must also provide, *inter alia*, for preconstruction review of any major new "source" or any modification of a major existing "source" that will result in a significant net increase in pollutant emissions from the "source."[9] *Id.* Before a new major stationary "source" may be constructed in a nonattainment area or an existing major stationary "source" may be significantly modified in such an area, the owner or operator must obtain a permit evidencing compliance with a number of stringent substantive requirements.[10] If a State Plan under Part D is not yet in effect, no major stationary

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cludes the states from deferring necessary emission reductions to the end of the statutory compliance period. For example, a state which has determined that attainment of the $SO_2$ ambient standard will require a 100-ton-per-year reduction of $SO_2$ emissions might satisfy the "reasonable further progress" requirement by directing existing sources to reduce their emissions by a total of 20 tons the first year, 35 tons the second year, and 45 tons the third year.

[9] A "major stationary source" is one which emits, or has the potential to emit, one hundred tons per year or more of any air pollutant. Section 302(j), 42 U.S.. § 7602(j). A "major" modification is one that results in a "significant net emissions increase" of any pollutant. 40 C.F.R. § 51.18(j)(1)(v) (1982). The significance levels currently in force are:

Carbon monoxide: 100 tons per year (tpy)
Nitrogen oxides: 40 tpy
Sulfur dioxide: 40 tpy
Particulate matter: 25 tpy
Ozone: 40 tpy of volatile organic compounds
Lead: 0.6 tpy

40 C.F.R. § 51.18(j)(1)(xiii) (1982).

[10] Preconstruction permits may be issued only if: (1) the increase in emissions from the new or modified major source will be more than offset by corresponding emission decreases in the area, or have already been accounted for by a growth allowance built into the State Plan; (2) the new or modified major source installs control technology to achieve the lowest achievable emission rate for such category of sources; (3) the new source owner certifies that the other major

"source" may be constructed or modified in a nonattainment area if the construction or modification will cause or contribute to a violation of an ambient air standard. Section 110(a)(2)(I), 42 U.S.C. § 7410(a)(2)(I). This prohibition is sometimes referred to as the "construction moratorium." *See, e.g.*, Chev. App. at A-8.

The issue in this case is whether EPA may define, and permit the states to define, "source" as an entire plant for purposes of preconstruction review under Part D of the Clean Air Act. If "source" is so defined, the owner or operator of an industrial plant located in a nonattainment area can make a process or equipment change which results in an increase in pollutant emissions at one unit within the plant without becoming subject to the permit process required by Part D in Section 172(b)(6), 42 U.S.C. § 7502(b)(6), *if* he counters that increase with an equal or greater contemporaneous *decrease* in emissions elsewhere in the plant. This is because the Act provides that a "modification"[11] of a source occurs only when a physical change to that source results in a *net* emissions *increase* from the source as a whole.[12]

In regulations promulgated on August 7, 1980,[13] EPA had defined the term "source" for purposes of Part D as *both* an

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sources it owns in the state are in compliance with the Act; and (4) the state is carrying out its revised Part D State Plan. Section 173(1)-(4), 42 U.S.C. § 7503(1)-(4).

[11] "Modification" is defined in Section 111(a)(4) of the Act, 42 U.S.C. § 7411(a)(4), as "any physical change in, or change in the method of operation of, a stationary source *which increases the amount of any air pollutant emitted by such source* or which results in the emission of any air pollutant not previously emitted." (Emphasis added.) This definition is expressly incorporated into Part D. *See* Section 171(4), 42 U.S.C. § 7501(4).

[12] *See* Alabama Power Co. v. Costle, 636 F.2d 323, 401-02 (D.C. Cir. 1979).

[13] 45 Fed. Reg. 52676 (August 7, 1980).

industrial plant *and* the individual pieces of process equipment within the plant. EPA's stated intention in adopting this "dual" definition of "source" was to subject the maximum number of "sources" and internal modifications at major "sources" to new source review and the permit requirements of Part D. 45 Fed. Reg. 52676, 52697 (August 7, 1980). As a consequence of this definition, virtually every significant process or equipment change undertaken by a plant owner or operator, even those which resulted in a net emissions decrease from the plant as a whole, were subjected to these requirements. This "dual" definition was immediately challenged as arbitrary and illegal[14] because the D.C. Circuit in two prior cases had held that EPA's discretion to define the term "source" under Section 111(a)(3), 42 U.S.C. § 7411(a)(3), as applied to other parts of the Act, did not extend to defining a "source" as a "combination of sources."[15] EPA thereafter undertook further rulemaking, which included significant public and state participation, following which, in October 1981, EPA adopted and permitted the states to adopt a single plantwide "source" definition for purposes of all programs established by the 1977 Amendments.[16] 46 Fed. Reg. 50766 (October 14, 1981). By making this

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[14] *See* Chemical Manufacturers Association v. EPA, No. 79-1112 and consolidated cases (D.C. Cir. 1979).

[15] Alabama Power Co. v. Costle, 636 F.2d at 395-96; ASARCO, Inc. v. EPA, 578 F.2d 319, 327-29 (D.C. Cir. 1978).

[16] In 1977, Congress added both Parts C and D to Title I of the Act. Part C, entitled "Prevention of Significant Deterioration of Air Quality," sets forth measures and requirements to be applied in areas where the ambient air quality is *better* than required by national ambient air quality standards. EPA's regulations implementing the prevention of significant deterioration program under Part C of the Act contain a plantwide "source" definition. *See* 40 C.F.R. § 51.24(b)(5) (1982).

EPA's October 1981 definition of "source" for Part D purposes is identical to the Part C "source" definition. *See, e.g.*, 40 C.F.R. § 51.18(j)(1)(i) (1982). Both definitions adopted verbatim the statuto-

revision, EPA intended (1) to reduce the regulatory complexity of the prior "dual" definition, which had engendered confusion among source owners and operators, and (2) more importantly, to allow the states greater flexibility in developing their programs to achieve the required ambient air quality standards. *Id.* at 50767.

The plantwide source definition makes it possible for essential industrial growth and modernization of plants located in nonattainment areas to continue, while providing strong incentives to plant managers to improve air quality in those areas. Where the plantwide definition applies, lengthy and costly preconstruction review for modified industrial operations becomes unnecessary so long as there is no net increase in pollutant emissions from the plant as a whole.[17] This netting of

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ry definition of "source" set forth in Section 111(a)(3), 42 U.S.C. § 7411(a)(3) (relating to standards of performance for new stationary sources): "any building, structure, facility, or installation which emits or may emit any air pollutant."

Exercising the discretionary power expressly recognized in *Alabama Power*, 636 F.2d at 397-398, to adopt definitions of the component terms of "source," EPA in its October 1981 regulations, as in its regulations under Part C, defined "building, structure, facility, or installation" to mean "all of the pollutant-emitting activities which belong to the same industrial grouping," *e.g.*, as a plant. *See, e.g.*, 40 C.F.R. §§ 51.18(j)(1)(ii) (1982) and 51.24(b)(6) (1982).

[17] For example, the plantwide definition would allow a plant owner or operator to replace an obsolete, energy-intensive boiler which emits 120 tons of particulate matter per year with a new energy-efficient boiler which emits 105 tons of particulate matter per year without first obtaining a permit. Under EPA's prior "dual definition" of "source" the new boiler would be deemed a new source for which a permit was required even though emissions from the overall plant decreased by 15 tons per year. The new boiler, however, is subject to stringent emission controls specified in new source standards of performance applicable under Section 111 of the Act. *See* 42 U.S.C. § 7411.

internal-emission increases against internal-emission decreases is sometimes referred to as the "bubble concept," since the plant is treated as if it were under a canopy or "bubble" for purposes of determining its net emissions. The bubble concept is widely recognized as one of the most efficient, cost-effective and, therefore, anti-inflationary means of controlling air pollution because it encourages plant owners and operators to apply their know-how and ingenuity to develop improved methods for controlling air pollution. The plant manager is given the flexibility to install tighter controls where costs are lowest and lesser controls where costs are highest. As a result, for any commitment of resources, more pollution control can be accomplished.[18]

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[18] In an editorial commenting upon EPA's first adoption of an air pollution bubble policy, one aimed at giving existing plants greater flexibility in meeting clean air requirements in State Plans, the *Washington Post* stated "EPA deserves congratulations for that governmental rarity—a creative and practical new idea." Washington Post, Dec. 10, 1979, at A26. Similarly, the *New York Times* stated "The bubble is so sensible an idea that one wonders why it took so long to surface." New York Times, Dec. 6, 1979, at A30. *See also EPA and Industry Pursue Regulatory Options*, Science, Feb. 20, 1981, at 796-98. Another commentator cited the following example of how the "bubble" would work at an existing plant:

> Until recently, E.I. du Pont de Nemours & Co. was slated to spend a staggering $26 million to meet clean air standards at its Chambers, N.J. chemical plant. But under a new regulatory scheme developed by the Environmental Protection Agency, du Pont's compliance bill could be pared to just $6.5 million, and still total plant emissions *would be reduced a full 89%*, five percentage points more than under the costlier plan.

*New Ways to Short Cut Costly Rules*, Dun's Review, Feb., 1980, 62, 62. (Emphasis added.) *See generally* National Commission on Air Quality, *To Breathe Clean Air*, 2.1-84, 4.1-36-37 (1981). The National Commission on Air Quality later stated with regard to use of the bubble concept in the Part C program:

> The bubble policy offers companies a strong incentive to reduce emissions from existing facilities in order to modernize without

As a result of a challenge by NRDC, the revised regulations were vacated by the court below.[19] The court also denied (by a five to one vote) petitioners' suggestion for rehearing *en banc*. Chev. App. at B-25.

The decision below forces plants in nonattainment areas to engage in lengthy preconstruction review procedures for proposed new or modified plant operations, even though (1) the change results in no increase, or even a net decrease, in pollutant emissions from the plant, and (2) the area as a whole continues to make "reasonable further progress" toward attainment of national ambient air quality standards by the

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> triggering [prevention of significant deterioration] review. While there are not sufficient data to quantify the influence of the bubble policy on total emission levels, the consensus of regulators and industry is that it has led to significant reductions. . . .

*Id.* at 3.5-48 [citation omitted].

[19] The vacated regulations also deleted provisions in EPA's August 7, 1980 rules which required "reconstructed" facilities in nonattainment areas to undergo new source review as if they were new sources. EPA defined "reconstruction" as any rebuilding of a "source" for which the capital cost of the new components exceeds 50 percent of the capital cost of a comparable entirely new source. *See* 45 Fed. Reg. at 52742 (former 40 C.F.R. § 51.18 (j)(1)(ix) (1981)). This economic test imposed new source review without regard to whether emissions resulting from the reconstructed source increased, decreased or stayed the same. The court below vacated EPA's deletion of the reconstruction rule as "ancillary" to EPA's adoption of the plantwide definition of "source." Chev. App. at A-19 — A-20. Petitioners submit that the court below should have upheld EPA's decision to delete the reconstruction rule whether or not it upheld the plantwide definition. If the validity of EPA's action deleting the reconstruction rule is to be tied to the plantwide definition of "source," however, as asserted by the court below, and by EPA, 46 Fed. Reg. at 50767, validation of the plantwide "source" definition by this Court also validates EPA's decision to delete the reconstruction rule.

compliance dates specified in the statute. In areas where a State Plan has not yet been approved by EPA—whether or not for reasons related to stationary source emissions—the construction moratorium would prevent plant owners or operators from undertaking any significant modifications at a plant even where such changes *reduce* pollutant emissions from the plant. *See* Section 110(a)(2)(I), 42 U.S.C. § 7410(a)(2)(I).[20] This would preclude plant owners from replacing aging or energy-intensive equipment or from otherwise modernizing their equipment.

## REASONS FOR GRANTING THE WRIT

### I. The Decision Below Inhibits Reasonable Economic Growth In Nonattainment Areas And Thus Impedes The Nation's Ability To Recover From The Current Recession.

If this country is to experience full recovery from the current period of recession, low production, and unemployment, this Court's review of the decision below is of critical importance. Contrary to one of Congress' stated purposes in enacting the 1977 Amendments to the Clean Air Act and to the national interest in economic recovery, the decision below inhibits "reasonable economic growth,"[21] in heavily industrialized areas without benefiting air quality. It necessarily will tend to discourage or postpone the rebuilding of existing outmoded industrial facilities—rebuilding that would put people to work and result in more efficient production.

In proposing and in taking final action to rescind its "dual" "source" definition, EPA cited concerns expressed by and documented in state, industry, and public comments that (1)

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[20] If the construction moratorium applies, equipment replacement or modernization is precluded even if the plant owner is able to comply with all of the Part D permit requirements (lowest achievable emission rate, offsets, statewide compliance, etc.) imposed by Section 173, 42 U.S.C. § 7503.

[21] H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 211 (1977).

the "dual" definition was acting as a disincentive to new investment and modernization by discouraging modifications to existing facilities, and (2) it could actually retard progress in air pollution control by discouraging replacement of older, dirtier processes or pieces of equipment with new, cleaner ones. 46 Fed. Reg. 16280, 16281 (March 12, 1981); 46 Fed. Reg. at 50768. Moreover, because Section 110(a)(2)(I), 42 U.S.C. § 7410(a)(2)(I), bans construction or modification of major "sources" in nonattainment areas lacking a State Plan meeting the requirements of Part D (the "construction moratorium"; *see* pages 4-5 *supra*), the decision below brings to a halt necessary process changes and upgrading of industrial plants in such areas in states which today do not define "source" as compelled by that decision, even where those changes would result in a net *decrease* in emissions from a plant. *See, e.g.*, Chev. Pet. at 2.

### II. The Issues Decided Below Have National Impact But Cannot Be Raised In Another Circuit Or In Individual Enforcement Proceedings

Although the impact of the decision below is nationwide in scope, recourse to judicial relief is severely limited. The regulations under review here were designated by EPA as "nationally applicable," 46 Fed. Reg. at 50766, and, unlike most federal agency decisions, nationally applicable EPA regulations under the Clean Air Act may be reviewed only by the Court of Appeals for the District of Columbia Circuit. Section 307(b)(1), 42 U.S.C. § 7607(b)(1). Moreover, under Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), challenges to the rules at issue in this litigation must be brought within 60 days of promulgation. Thereafter, the rules are not subject to challenge, not even as a defense in civil or criminal litigation. *See* Section 307(b)(2), 42 U.S.C. § 7607(b)(2).[2] Section 307(b) thus precludes any possibility of a

[2] However, on at least two occasions, members of this Court have expressed reservations regarding the constitutionality of the notice and review preclusion provisions of Section 307(b). *See* Harrison v.

conflict among the circuits and also precludes any further challenges to these rules. Only this Court can address the issues raised by these rules and only on this occasion.

### III. Contrary To Decisions Of This Court, The Court Below Unduly Intrudes Upon The Discretion Of The States To Select Their Choice Of Means For Attainment Of Air Quality Standards Within Their Borders

Because it dictates the scope of each state's stationary source preconstruction review and permit program, the decision below unlawfully limits the discretion of the states to make internal regulatory decisions as to the best means to attain ambient air standards and thus is inconsistent with this Court's holdings in *Train* v. *NRDC*, 421 U.S. 60, 79-80, 86-87 (1975), and *Union Electric Co.* v. *EPA*, 427 U.S. 246, 266 (1976). Those decisions made clear that the Clean Air Act places "primary responsibility"[23] for assuring air quality on the states, not EPA or the courts, and that EPA *must* approve the mix of emission controls in a state implementation plan so long as it provides for timely attainment of national ambient air standards.[24]

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PPG Industries, Inc., 446 U.S. 578, 592 n.9, 594-95 (1980) (majority opinion, dictum), (Powell, J. concurring); Adamo Wrecking Co. v. United States, 434 U.S. 275, 289 (1978) (Powell, J. concurring).

[23] *See* Section 107(a), 42 U.S.C. § 7407(a), *quoted* in *Train* v. *NRDC*, 421 U.S. at 64 ("Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State . . ."). *See also* Section 101(a)(3), 42 U.S.C. § 7401(a)(3) ("the prevention and control of air pollution at its source is the primary responsibility of States and local governments").

[24] *See Train* v. *NRDC*, 421 U.S. at 64, 79-80. Under Section 110(a)(3) of the Act, EPA is essentially limited to a plan-revision review function. *See* Section 110(a)(3), 42 U.S.C. § 7410(a)(3). Having set ambient air quality standards, EPA must approve or disapprove a plan revision within four months of submission and must

States may wish to address the problem of ultimately achieving attainment of national ambient air quality standards under Part D in ways other than requiring mandatory preconstruction review of activities which do not increase emissions. *See* page 14 *infra*. One such approach would be to broaden the base for emission control efforts by targeting other existing sources of emissions which, when subject to regulatory scrutiny, might yield significant emission reductions. Another approach would be to impose more stringent controls upon existing sources in order to exceed the pollutant reductions necessary to attain the ambient air standards and create thereby an emissions reserve or allowance for future growth.[25]

In enacting the 1977 Amendments to the Clean Air Act, Congress specifically intended to increase the states' flexibility to tailor implementation plans to their particular circumstances so long as reasonable further progress toward attainment was assured.[26] Congress declared that Part D has:

> "two main purposes: (1) to allow reasonable economic growth to continue in [a nonattainment] area while making reasonable further progress to assure attainment of

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approve it if it provides for timely maintenance and attainment of the standards and otherwise meets the requirements set forth in Section 110(a)(2) and, *inter alia*, Part D.

[25] This establishment of a pollutant emissions allowance for economic growth planning purposes is contemplated and specifically authorized in Part D at Sections 172(b)(5) and 173(1)(B), 42 U.S.C. §§ 7502(b)(5) and 7503(1)(B).

[26] As explained in the 1977 Senate Report:

> The authority of States and localities to implement air pollution control programs within the framework of a national policy must be encouraged. The framework proposed in this bill is flexible in terms of the discretion in choosing methods for attaining firm national goals. *States and localities are given broad discretion to make decisions, while maintaining the minimum national air quality baselines designed to protect health and welfare, prevent discrimination among States, protect national*

the standards by a fixed date; and (2) to *allow States greater flexibility* for the former purposes than EPA's present interpretative regulations afford."

H.R. Rep. No. 95-294 at 211.[27] (Emphasis added.)

With regard to the latter purpose, there is no question that many states welcomed the additional flexibility provided by EPA's plantwide definition of "source." As EPA pointed out in its motion in the court below to stay issuance of the mandate, within one year of the promulgation of the amended definition (*i.e.*, by Oct. 14, 1982), eighteen states had adopted new source review programs based upon the amended rules. Respondent's Motion to Stay Issuance of the Mandate, at 2, *NRDC* v. *Gorsuch*, No. 81-2208 (D.C. Cir. motion filed November 2, 1982). Thirteen more states were in the process of revising their new source review programs in accordance with the regulations struck down by the court below. *Id.* n. 1. As EPA had specified in the preamble to its amendments, each state adopting a plantwide definition of "source" was required to demonstrate, in order to obtain EPA approval thereof, that reasonable further progress and attainment were ensured. *See* 46 Fed. Reg. at 50767.

Because EPA's imposition of the "dual" "source" definition upon the states impermissibly infringed upon the states'

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*resources within States, and provide guidance on the technical and the economic implications of various national policies.*

*The problem of air pollution exists at the State and local level. That is where the public understands the problem. That is where the resources must be directed.* The Federal Government has a responsibility to provide support for those regulatory activities, but it need not have an actual presence in all regulatory activities.

S. Rep. No. 95-127, 95th Cong., 1st Sess. 10 (1977). (Emphasis added.)

[27] As the Conference Report makes clear, the preconstruction permit program for new and modified sources in nonattainment areas was taken primarily from the House bill. H.R. Rep. No. 95-564, 95th Cong., 1st Sess. at 157-58 (1977).

statutorily reserved discretion, EPA properly deleted these provisions in October, 1981. The decision of the court below, however, reinstates the "dual" definition and denies the states the flexibility that Congress intended them to have.

### IV. Contrary To *Train* v. *NRDC*, 421 U.S. 60 (1975), The Court Below Impermissibly Substituted Its Judgment For EPA's Reasonable Construction Of The Clean Air Act

This Court, recognizing that the Clean Air Act is a complex and often ambiguous statute, has made clear that so long as EPA's construction of the Act is a "sufficiently reasonable" one, it must be upheld. *Train* v. *NRDC*, 421 U.S. at 87. The administrative record amply supports EPA's determination that the plantwide definition is a "sufficiently reasonable" one. *See* Chev. Pet. at 12-14 (discussion and record citations).

In rejecting EPA's plantwide "source" definition, however, the court below did not find, nor purport to find, any basis for its decision in the statutory language in Part D of the Clean Air Act, the legislative history of Part D, or the extensive administrative record before EPA. Instead, the court below struck down EPA's definition of "source" as *per se* invalid solely because of a "bright line" test drawn, in its view, by other panels of that court in two prior cases involving air quality. *See* Chev. App. at A-16 - A-17. These cases, *ASARCO, Inc.* v. *EPA*, 578 F.2d 319 (1978), and *Alabama Power Co.* v. *Costle*, 636 F.2d 323 (1979), according to the decision below, drew a line between programs designed to "improve" air quality, for which a plantwide "source" definition is precluded, and programs that only "maintain" air quality, for which a single plantwide "source" definition is required.[25] Chev. App. at A-2 - A-3, A-14 - A-15.

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[25] As the court below stated, "We express no view on the decision we would reach if the line drawn in *Alabama Power and ASARCO* did not control our judgment." Chev. App. at A-4 n.7.

Neither *ASARCO* nor *Alabama Power*, however, involved the same regulatory or statutory provisions at issue here, and neither case, alone or in combination, purported to draw such a "bright line" distinction applicable to all other Clean Air Act programs. On the contrary, recognizing that the various programs under the Act are complex and require individual scrutiny, the panel in each case recognized EPA's discretion to define "source" and its component terms as appropriate for each particular program. *See Alabama Power*, 636 F.2d at 397-8; *ASARCO*, 578 F.2d at 324 n.17. In fact, this "bright line" distinction, which constituted the sole basis for the panel's decision, is fundamentally inconsistent with and fails to explain the results of the two cases that are supposed to have established it.

*Alabama Power* held the plantwide "source" definition to be required under Part C of the Act, 42 U.S.C. §§ 7470, *et seq.*, which deals with the protection of air quality where ambient air standards are met. EPA's October 1981 decision to adopt an identical definition of "source" for Part D was reasonable and should not have been vacated by the court below. The court failed to realize that with Part D, as with Part C,

> "Congress wished to apply the permit process . . . only where industrial changes might increase pollution in an area, not where an existing plant changed its operations in ways that produced no pollution increase."

*Alabama Power*, 636 F.2d at 401.

*Alabama Power* also held that a narrow "source" definition was not consistent with the goals of the 1977 Amendments: *i.e.*, to allow the states increased flexibility to comply with air quality requirements in the most efficient and cost-effective manner. *Alabama Power*, 636 F.2d at 401-02. It distinguished *ASARCO* which involved standards for performance for new sources under Section 111, 42 U.S.C. § 7411—a program which applies to certain defined operations, wholly in addition to and apart from Parts C and D of the Act. *Alabama Power*, 636 F.2d at 402. The purpose of that program differs substantially from

*both* Parts C and D; it deals with technology-based standards applicable to all new construction of specifically-defined operations, regardless of where located.

Thus, the court below not only impermissibly substituted its judgment for that of EPA but also (1) decided the case in a manner which conflicts in principle with the decisions of earlier panels of the same court and (2) relied on those decisions to draw a differentiating line which those decisions do not support. This Court should grant certiorari because the decision below creates, and will continue to cause, irrational differences among several of the most important programs under the Clean Air Act.

### V. The Court Below Incorrectly Imposed A Substantially Higher Burden Upon EPA To Justify Revising Its Rule Than When Adopting It.

Noting that EPA took a contrary position in adopting its October 1981 amendments from that it had taken when it adopted its 1980 "dual" "source" definition, the court below faulted EPA for failing to cite "any study, survey, or support for the opposite position." Chev. App. at A-18 n.41. Lacking this type of support, the court stated, the rationale provided by EPA "would not rise to the level of reasoned decision-making."[29] *Id.* The court seems to be holding EPA to a substantially higher, although unspecified, burden to justify its rescission of the "dual" definition of "source" than its initial adoption of that definition. However, this is plainly erroneous since, as

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[29] In making these assertions, the court below overlooked the eighty one public and state comments received by EPA, the majority of which favored EPA's proposals to delete the "dual" definition of "source." *See* 46 Fed. Reg. at 50767. EPA also cited specific examples provided by commenters supporting and documenting EPA's rationale for rescinding the "dual" definition. *Id.* at 50768. In any event, if EPA's October 1981 rules lacked an acceptable measure of support, EPA's August 7, 1980 rules, which imposed the "dual" definition, also lacked that level of support. EPA cited no "study, survey, or support" when it adopted the "dual" definition in 1980.

the D.C. Circuit itself stated in a recent case, "It is well settled that an agency may alter or reverse its position if the change is supported by a reasoned explanation." *Environmental Defense Fund, Inc.* v. *Costle*, 657 F.2d 275, 289 (D.C. Cir. 1981) (citations omitted).

By requiring agencies to produce support stronger than "a reasoned explanation" for revisions to rules, the court below, contrary to this Court's strong admonition in *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 540-49 (1978), judicially imposes unwarranted procedural obligations and, indeed, substantive obligations. It has fashioned a novel standard of review which, although totally without basis in the Administrative Procedure Act, *see, e.g.*, 5 U.S.C. § 706(2), appears well on the way to being law in the D.C. Circuit. *Cf.*, *State Farm Mutual Automobile Insurance Co.* v. *DOT*, 680 F.2d 206 (D.C. Cir. 1982), *cert. granted*, ___ U.S. ___, 51 U.S.L.W. 3353 (Nov. 9, 1982) (No. 82-354) (automobile airbag case). The decision below undermines the broad discretion accorded agencies in informal rulemaking proceedings and seriously hampers their ability to streamline or update their rules.

This Court has recognized that an agency may make and rely upon reasoned forecasts of future events and that such a forecast " 'necessarily involves deductions based on the expert knowledge of the Agency'." *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 595 (1981) (footnote omitted), *quoting*, *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 814 (1978), *quoting*, *FPC* v. *Transcontinental Gas Pipeline Corp.*, 365 U.S. 1, 29 (1961). EPA has rationally and with a full explanation changed its expert judgment as to the best policy to implement Part D. Mere change does not mean its action was defective nor that a substantially more stringent standard of review should be applied by the reviewing court.

Where, as here, an agency rationally concludes that a prior forecast of public benefit is of doubtful validity and, fully explaining its action, seeks to withdraw those portions of a rule

which were premised on that forecast, the agency should not be precluded from acting by a court-imposed requirement that it has a substantially greater burden to justify revision of a rule or portion thereof than its burden when justifying the initial promulgation of the rule.

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

## INDEX TO APPENDIX

## A. STATUTORY PROVISIONS: PERTINENT SECTIONS OF THE CLEAN AIR ACT

**1. Section 101(a)(3), 42 U.S.C. § 7401(a)(3), as amended:**

**§ 7401. Congressional findings and declaration of purpose**

(a) The Congress finds—

* * *

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments;

* * *

**2. Section 107(a), (d), 42 U.S.C. § 7407(a), (d), as amended:**

**§ 7407. Air quality control regions**

(a) Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

* * *

(d)(1) For the purpose of transportation control planning, part D of this subchapter (relating to nonattainment), part C of this subchapter (relating to prevention of significant deterioration of air quality), and for other purposes, each State, within one hundred and twenty days after August 7, 1977, shall submit to the Administrator a list, together with a summary of the available information, identifying those air quality control regions, or portions thereof, established pursuant to this section in such State which on August 7, 1977—

(A) do not meet a national primary ambient air quality standard for any air pollutant other than sulfur dioxide or particulate matter;

(B) do not meet, or in the judgment of the State may not in the time period required by an applicable implementation plan attain or maintain, any national primary ambient air quality standard for sulfur dioxide or particulate matter;

(C) do not meet a national secondary ambient air quality standard;

(D) cannot be classified under subparagraph (B) or (C) of this paragraph on the basis of available information, for ambient air quality levels for sulfur oxides or particulate matter; or

(E) have ambient air quality levels better than any national primary or secondary air quality standard other than for sulfur dioxide or particulate matter, or for which there is not sufficient data to be classified under subparagraph (A) or (C) of this paragraph.

(2) Not later than sixty days after submittal of the list under paragraph (1) of this subsection the Administrator shall promulgate each such list with such modifications as he deems necessary. Whenever the Administrator proposes to modify a list submitted by a State, he shall notify the State and request all available data relating to such region or portion, and provide such State with an opportunity to demonstrate why any proposed modification is inappropriate.

(4)[1] Any region or portion thereof which is not classified under subparagraph (B) or (C) of paragraph (1) of this subsection for sulfur dioxide or particulate matter within one hundred and eighty days after August 7, 1977, shall be deemed to be a region classified under subparagraph (D) of paragraph (1) of this subsection.

(5) A State may from time to time review, and as appropriate revise and resubmit, the list required under this subsection. The Administrator shall consider and promulgate such revised list in accordance with this subsection.

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[1] Subsec. (d) enacted without a par. (3).

**3. Sections 110(a)(2)(A), (B), (I), (3)(A), 42 U.S.C. § 7410(a)(2)(A), (B), (I), (3)(A), as amended:**

**§ 7410. State implementation plans for national primary and secondary ambient air quality standards**

* * *

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) except as may be provided in subparagraph (I), (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e) of this section) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, transportation controls, air quality maintenance plans, and preconstruction review of direct sources of air pollution as provided in subparagraph (D);

* * *

(I) It provides that after June 30, 1979, no major stationary source shall be constructed or modified in any nonattainment area (as defined in section 7501(2) of this title) to which such plan applies, if the emissions from such facility will cause or contribute to concentrations of any pollutant for which a national ambient air quality standard is exceeded in such area, unless, as of the time of application for a permit for such construction

or modification, such plan meets the requirements of part D of this subchapter (relating to nonattainment areas);

* * *

(3)(A) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

**4. Sections 111(a)(1)(A), (B), (2), (3), (4), (6); 42 U.S.C. § 7411(a)(1)(A), (B), (2), (3), (4), (6), as amended:**

§ 7411. Standards of performance for new stationary sources

(a) For purposes of this section:

(1) The term "standard of performance" means—

(A) with respect to any air pollutant emitted from a category of fossil fuel fired stationary sources to which subsection (b) of this section applies, a standard—

(i) establishing allowable emission limitations for such category of sources, and

(ii) requiring the achievement of a percentage reduction in the emissions from such category of sources from the emissions which would have resulted from the use of fuels which are not subject to treatment prior to combustion,

(B) with respect to any air pollutant emitted from a category of stationary sources (other than fossil fuel fired sources)

to which subsection (b) of this section applies, a standard such as that referred to in subparagraph (A)(i); and

* * *

(2) The term "new source" means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier,

proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

(3) The term "stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant.

(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

* * *

(6) The term "existing source" means any stationary source other than a new source.

**5. Part D, Sections 171-173; 42 U.S.C. §§ 7501-7503, as amended:**

## PART D—PLAN REQUIREMENTS FOR NONATTAINMENT AREAS

### § 7501. Definitions

For the purpose of this part and section 7410(a)(2)(I) of this title—

(1) The term "reasonable further progress" means annual incremental reductions in emissions of the applicable air pollutant (including substantial reductions in the early years following approval or promulgation of plan provisions under this part and section 7410(a)(2)(I) of this title and regular reductions thereafter) which are sufficient in the judgment of the Administrator, to provide for attainment of the applicable national ambient air quality standard by the date required in section 7502(a) of this title.

(2) The term "nonattainment area" means, for any air pollutant an area which is shown by monitored data or which is calculated by air quality modeling (or other methods determined by the Administrator to be reliable) to exceed any national ambient air quality standard for such pollutant. Such term includes any area identified

under subparagraphs (A) through (C) of section 7407(d)(1) of this title.

(3) The term "lowest achievable emission rate" means for any source, that rate of emissions which reflects—

(A) the most stringent emission limitation which is contained in the implementation plan of any State for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable, or

(B) the most stringent emission limitation which is achieved in practice by such class or category of source, whichever is more stringent.

In no event shall the application of this term permit a proposed new or modified source to emit any pollutant in excess of the amount allowable under applicable new source standards of performance.

(4) The terms "modification" and "modified" mean the same as the term "modification" as used in section 7411(a)(4) of this title.

**§ 7502. Nonattainment plan provisions**

(a)(1) The provisions of an applicable implementation plan for a State relating to attainment and maintenance of national ambient air quality standards in any nonattainment area which are required by section 7410(a)(2)(I) of this title as a precondition for the construction or modification of any major stationary source in any such area on or after July 1, 1979, shall provide for attainment of each such national ambient air quality standard in each such area as expeditiously as practicable, but, in the case of national primary ambient air quality standards, not later than December 31, 1982.

(2) In the case of the national primary ambient air quality standard for photochemical oxidants or carbon monoxide (or both) if the State demonstrates to to[1] the satisfaction of the Administrator (on or before the time required for submission of such plan) that such attainment is not possible in an area with respect to either or both of such pollutants within the period prior to December 31, 1982, despite the implementation of all reasonably available

measures, such provisions shall provide for the attainment of the national primary standard for the pollutant (or pollutants) with respect to which such demonstration is made, as expeditiously as practicable but not later than December 31, 1987.

(b) The plan provisions required by subsection (a) of this section shall—

(1) be adopted by the State (or promulgated by the Administrator under section 7410(c) of this title) after reasonable notice and public hearing;

(2) provide for the implementation of all reasonably available control measures as expeditiously as practicable;

(3) require, in the interim, reasonable further progress (as defined in section 7501(1) of this title) including such reduction in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology;

(4) include a comprehensive, accurate, current inventory of actual emissions from all sources (as provided by rule of the Administrator) of each such pollutant for each such area which is revised and resubmitted as frequently as may be necessary to assure that the requirements of paragraph (3) are met and to assess the need for additional reductions to assure attainment of each standard by the date required under subsection (a) of this section;

(5) expressly identify and quantify the emissions, if any, of any such pollutant which will be allowed to result from the construction and operation of major new or modified stationary sources for each such area;

(6) require permits for the construction and operation of new or modified major stationary sources in accordance with section 7503 of this title (relating to permit requirements);

(7) identify and commit the financial and manpower resources necessary to carry out the plan provisions required by this subsection;

(8) contain emission limitations, schedules of compliance and such other measures as may be necessary to meet the requirements of this section;

* * *

**§ 7503. Permit requirements**

The permit program required by section 7502(b)(6) of this title shall provide that permits to construct and operate may be issued if—

(1) the permitting agency determines that—

(A) by the time the source is to commence operation, total allowable emissions from existing sources in the region, from new or modified sources which are not major emitting facilities and from the proposed source will be sufficiently less than total emissions from existing sources allowed under the applicable implementation plan prior to the application for such permit to construct or modify so as to represent (when considered together with the plan provisions required under section 7502 of this title) reasonable further progress (as defined in section 7501 of this title); or

(B) that emissions of such pollutant resulting from the proposed new or modified major stationary source will not cause or contribute to emissions levels which exceed the allowance permitted for such pollutant for such area from new or modified major stationary sources under section 7502(b) of this title;

(2) the proposed source is required to comply with the lowest achievable emission rate;

(3) the owner or operator of the proposed new or modified source has demonstrated that all major stationary sources owned or operated by such person (or by any entity controlling, controlled by, or under common control with such person) in such State are subject to emission limitations and are in compliance, or on a schedule for compliance, with all applicable emission limitations and standards under this chapter; and

(4) the applicable implementation plan is being carried out for the nonattainment area in which the proposed source is to be constructed or modified in accordance with

the requirements of this part. Any emission reductions required as a precondition of the issuance of a permit under paragraph (1)(A) shall be legally binding before such permit may be issued.

**6. Section 302(j); 42 U.S.C. § 7602(j), as amended:**

(j) Except as otherwise expressly provided, the terms "major stationary source" and "major emitting facility" mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator).

**7. Section 307(b)(1), (2); 42 U.S.C. § 7607(b)(1), (2), as amended:**

**§ 7607. Administrative proceedings and judicial review**

* * *

(b)(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412(c) of this title, under section 7413(d) of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 119(c)(2)(A), (B), or (C) (as in effect before August 7, 1977) or under regulations thereunder, or any other final action of the Adminis-

trator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

**B. REGULATORY PROVISIONS**

**1. Proposed Rule, 46 Fed. Reg. 16280 (March 12, 1981):**

40 CFR Parts 51 and 52

Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans

AGENCY: Environmental Protection Agency.

ACTION: Proposed rules.

SUMMARY: EPA regulations published on August 7, 1980 (45 FR 52676) adopted a different definition of "source" for the PSD rules (which require review of new or modified major sources in clean air areas) than for the nonattainment area new source review rules (which govern review of new or modified major sources in area where air quality does not meet Federal

standards). Under the PSD rules a source is, in essence, an entire plant. Under the current nonattainment area rules a source is *either* an entire plant *or* an individual piece of process equipment within the plant. EPA is now proposing to conform the nonattainment area definition of source to that contained in the PSD rules by changing the nonattainment area definition of source to be an entire plant only. The practical significance of this change will be to reduce the coverage of nonattainment area new source review. The same change will also apply to the rules governing the construction moratorium under Section 110(a)(2)(I) of the Act (which prohibits major new construction in nonattainment area lacking EPA-approved State Implementation Plans), which will similarly shrink the coverage of the moratorium. In addition, EPA proposes to drop its current requirement that "reconstructions" be subject to nonattainment area new source review.

**DATES:** The deadline for submitting comments is April 13, 1981.

**ADDRESS:** Comments should be addressed to Michael Trutna, Standards Implementation Branch (MD-15), Office of Air Quality Planning and Standards, Research Triangle Park, N.C. 27711, 919-541-5292.

**FOR FURTHER INFORMATION CONTACT:** Michael Trutna (919-541-5292) or Eric Smith (202-755-0788).

**SUPPLEMENTARY INFORMATION:** On August 7, 1980 EPA published amended rules affecting PSD new source review, nonattainment area new source review and the construction moratorium. 45 FR 52676. The Prevention of Significant Air Quality Deterioration (PSD) program requires new or modified "major"[1] air pollution sources locating in areas where

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[1] "Major" sources for PSD purpose are those which emit more than either 100 tons per year or 250 tons per year (depending on the type of source) of any pollutant. See Section 169(1) of the Act. 40 CFR 51.24(b)(1), 52.21(b)(1)).

national ambient air quality standards (NAAQS) are being attained (or where air quality data is insufficient to determine whether or not NAAQS are being attained) to obtain construction permits which meet the requirements of Part C of Title I of the Clean Air Act. The basic purpose of the PSD program is to protect air quality in clean air areas. In areas where NAAQS are not being attained new or modified "major"[2] sources which would emit the pollutant(s) for which the area is nonattainment must obtain construction permits under Section 173 of the Act. In addition, where a nonattainment area lacks an EPA-approved State Implementation Plan (SIP) that meets the requirements of Part D of Title I of the Act, new or modified major sources that would emit the nonattainment pollutant(s) may not construct at all. This "construction moratorium" is required by Section 110(a)(2)(I) of the Act. See 40 CFR 52.24. The definitions in EPA's regulations governing the applicability of the construction moratorium are the same as those used in the nonattainment new source review rules. 40 CFR 52.24(f).

EPA's amended rules define "source" differently for PSD and nonattainment purposes. The difference revolves around the treatment of a plant that contains a number of individual pieces of process equipment that themselves each emit more than 100 tons per year. For PSD, EPA generally defines "source" in terms of an entire plant. For the nonattainment program, however, EPA defines "source" as both the entire plant and each of those "major" pieces of process equipment within it.

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Each new "major" source must get a permit. In addition, any modification to a major source that causes a "significant" increase in emissions must get a permit. "Significant" increases in emissions are specified at 40 CFR 51.24(b)(23)(i), 52.21(b)(23)(i).

[2] "Major" sources for nonattainment purpose are those which emit more than 100 tons per year. 40 CFR 51.13(1)(v).

The "modification" test for nonattainment areas is the same as for PSD. See 40 CFR 51.18(j)(1)(xii).

An example will show how these different definitions work. Suppose that a plant has three pieces of process equipment each of which has a potential to emit about 400 tons per year. The owners of the plant decide to expand operations at one piece of equipment resulting in an increase of 70 tons per year of a criteria pollutant,[3] and they further intend to curtail operations at another piece of equipment so as to reduce emissions of the same pollutant by 70 tons per year. If the plant were subject to PSD requirements, these changes would not "modify" any "source." The plant as a whole is the source, and since the reduction at the second piece of equipment balances the increase at the first, there is no significant plant-wide increase in emissions. As noted earlier, a change at a source is not a modification subject to review unless it results in a significant overall increase in emissions. Thus, no permit would be needed. But if the plant were located in an area which is nonattainment for the pollutant involved, then each piece of process equipment is independently viewed as a source and the change at the first piece of equipment would have to undergo preconstruction review, because the piece of equipment is *itself* a major source and there is a significant net increase in emissions at that source. Compensating reductions obtained elsewhere at the plant could not be used to escape review, because these reductions did not occur at the same "source."

There would be a similar potential for differing results if the plant added a new piece of equipment with a potential to emit 300 tons per year. For PSD purposes, the relevant "source" is the plant, so that if the plant reduced emissions by 300 tons per year at the existing equipment, there would be no net increase at the source. But for nonattainment purposes, the new piece of equipment is itself a major source and so would be subject to review (or the construction moratorium) even if there had been no significant increase in emissions from the plant as a whole.

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[3] A criteria pollutant is one for which EPA has established a NAAQS.

These different definitions of source meant that more new construction projects are subject to review in nonattainment areas (or, if there is no EPA-approved Part D SIP, more new construction projects are subject to the construction moratorium) than in areas subject to PSD requirements.

EPA also requires new source review in nonattainment areas based on a capital investment test of "reconstruction". Specifically, whenever a company rebuilds a "source" so that more than 50% of the capital in it represents new investment, EPA will require new source review no matter how emissions are affected.

The Proposed Amendment

EPA today is proposing to change the definition of "source" contained in the rules governing nonattainment area new source review and the construction moratorium so as to make that definition conform to that contained in the PSD rules. The result will be to eliminate the differences in coverage between the PSD and nonattainment programs that were described above. The change is being carried out by amending the definition of the terms "building", "structure", "facility" and "installation", which are the components of the term "source." EPA is also proposing to delete the definition of "reconstruction."

Discussion

The decision to reconsider the scope of nonattainment area new source review has been made in the context of a Government-wide reexamination of regulatory burdens and complexities that is now in progress. EPA has also reevaluated all of the arguments on all sides of these definitional issues. The Agency has concluded that the amendments to the August 7 rules being proposed today will substantially reduce the burdens imposed on the regulated community without significantly interfering with timely achievement of the goals of the Clean Air Act.

The issue of the proper scope of the nonattainment area definition of "source" is not a clear-cut legal question. The statute does not provide an explicit answer, nor is the issue squarely addressed in the legislative history. The D.C. Circuit (in *Alabama Power Co.* v. *Costle*) has stated by implication that EPA has substantial discretion to define the constituent elements of this term.

The question thus involves a judgment as to how to best carry out the Act. Two issues have been reexamined here. The first is whether the definition of "source" in nonattainment areas should be modified to conform to the one in PSD areas. The second is whether new source review based on "reconstruction" should be required at all.[4]

EPA believes for the following reasons that the proposed change in the definition of "source" is appropriate.

1. The August 7 definition forbids *any* construction or modification of major pieces of process equipment in areas where the construction moratorium is in effect, even where no increase in emissions at a plant would result. There are a substantial number of such nonattainment areas nationwide at present.

2. Even outside of these "construction moratorium" areas under the present regulatory scheme the August 7 definition can act as a disincentive to new investment and modernization by discouraging modifications to existing facilities.

3. For both these reasons, under the current overall regulatory system, the August 7 definition can actually retard progress in air pollution control by discouraging replacement of older, dirtier processes or pieces of equipment with new, cleaner ones.

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[4] Of course, States always retain the right to choose to impose more stringent new source requirements than Federal rules mandate.

4. The proposed definition would simplify EPA's rules by using the same definition of "source" for PSD, nonattainment new source review and the construction moratorium. This reduces confusion and inconsistency.

5. States will remain subject to the requirement that for all nonattainment areas they demonstrate attainment of NAAQS as expeditiously as practicable and show reasonable further progress toward such attainment. Thus, the proposed change in the mandatory scope of nonattainment new source review should not interfere with the fundamental purpose of Part D of the Act.

6. New Source Performance Standards (NSPS) will continue to apply to many new or modified facilities and will assure use of the most up-to-date pollution control techniques regardless of the applicability of nonattainment area new source review.

7. In order to avoid nonattainment area new source review, a major plant undergoing modification must show that it will not experience a significant net increase in emissions. Where overall emissions increase significantly, review will continue to be required.

For these reasons EPA has reconsidered the concerns it expressed in the August 7 preamble (See 45 FR 52697-8) and has decided that the "dual definition" is excessively and unnecessarily burdensome.

In light of the change to the nonattainment area definition of source, there is good reason to abandon the "reconstruction" test for nonattainment area new source review. That test by itself only requires review in cases where there is reconstruction, but a "significant" increase in emissions is absent. With a plant-wide definition of source, the reconstruction provision would only trigger review in cases of plant-wide reconstruction. Few instances of plant-wide reconstruction are expected. Thus, there is little justification for the added complexity this provision entails. Moreover, this change will further reduce

inconsistency with the PSD rules which do not have a reconstruction provision.

The Clean Air Act, in Section 111, recognizes an independent, long-term interest in making sure that new facilities install state-of-the-art pollution controls when they are built. This results in the most cost-effective long-term air quality improvement by controlling pollution at the design stage, rather than requiring costly retrofits. Of course, this approach, unlike the nonattainment area requirements of Part D, is not based on the location of particular sources.

For these reasons, EPA believes that a "reconstruction" definition is appropriate for the new source performance standards under Section 111. However, the arguments for it are considerably weaker where a program of review basically designed to meet air quality standards in particular places is at issue, and EPA proposes to drop it there.

EPA solicits comments on the proposed rule. All such comments will be carefully considered prior to any final action.

Pursuant to the provisions of 5 U.S.C. 605(b), I hereby certify that the attached proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. This proposal will reduce regulatory burdens since fewer sources will be subject to new source review and the construction moratorium.

The Director of the Office Management and Budget, acting under Section 8(b) of Executive Order 12291, has granted this proposal an exemption from the provisions of that order because of its burden-relieving and deregulatory nature.

This Notice of Proposed Rulemaking is issued under Section 301 of the Clean Air Act, 42 U.S.C. Sec. 7601.

Dated: March 6, 1981.

Walter C. Barber, Jr.,

*Acting Administrator.*

1. Section II, Subsection A of the Emissions Offset Interpretative Ruling, 40 CFR Part 51 Appendix S, as revised 44

FR 3274 (January 16, 1979), 45 FR 31307 (May 13, 1980), and 45 FR 52741 (August 7, 1980) is proposed to be amended as follows:

a. By changing the words "Building, structure or facility" at the beginning of paragraph 2 to read "Building, structure, facility or installation";

b. By removing paragraph 3 and renumbering the succeeding paragraphs accordingly, and

c. By removing paragraph 9 and renumbering the succeeding paragraphs accordingly.

**§ 51.18 [Amended]**

2. Section 40 CFR 51.18(j)(1) is proposed to be amended as follows:

a. By changing the words "Building, structure or facility" at the beginning of subparagraph (ii) to read "Building, structure, facility or installation";

b. By removing subparagraph (iii) and renumbering the succeeding subparagraphs accordingly, and

c. By removing subparagraph (ix) and renumbering the succeeding subparagraphs accordingly.

**§ 52.24 [Amended]**

3. Section 40 CFR 52.24(f) is proposed to be amended as follows:

a. By changing the words "Building, structure or facility" at the beginning of subparagraph (2) to read "Building, structure, facility or installation";

b. By removing subparagraph (3) and renumbering the succeeding subparagraphs accordingly, and

c. By removing subparagraph (9) and renumbering the succeeding subparagraphs accordingly.

[FR Doc. 81-7764 Filed 3-11-81; 8:45 am]

2. **Final Rule (excerpts): 46 Fed. Reg. 50766, 50767, 50768, 50771 (October 14, 1981):**

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 52

**Requirements for Preparation, Adoption and Submittal of Implementation Plans and Approval and Promulgation of Implementation Plans**

**AGENCY:** Environmental Protection Agency.

**ACTION:** Final rule.

**SUMMARY:** On August 7, 1980 (45 FR 52676), EPA promulgated rules for review of major new sources and major modifications in areas where air quality does not meet federal standards (nonattainment areas). Those rules defined "source" in essence as *either* an entire plant *or* an individual piece of process equipment within the plant. On March 12, 1981 (46 FR 16280), EPA proposed to change the definition of source to be an entire plant only. That proposal is being promulgated as a final rule today. The practical significance of this change will be to reduce the coverage of nonattainment area new source review (NSR). The same change will also apply to the rules governing the construction moratorium under Section 110(a)(2)(I) of the Clean Air Act (which prohibits major new construction in nonattainment areas lacking a State Implementation Plan (SIP) approved by EPA under Part D of the Act). This change will similarly shrink the coverage of the moratorium.

EPA's August 7 rules also required reconstructed facilities to undergo nonattainment area NSR. As was proposed on March 12, EPA is also deleting that requirement today. These changes will allow states to reduce the regulatory burden of

new source review programs without impeding timely attainment and maintenance of air quality standards.

**DATES:** This rule is effective on October 14, 1981.

**FOR FURTHER INFORMATION CONTACT:** Kirt Cox, Standards Implementation Branch (MD-15), Office of Air Quality Planning and Standards, Research Triangle Park, N.C. 27711, 919-541-5592.

**SUPPLEMENTARY INFORMATION:**

## I. Background

### *A. Definition of Source*

Under the Clean Air Act, all major new stationary sources and modifications to existing major sources must obtain a permit before they may construct—a Prevention of Significant Deterioration (PSD) permit if the source or modification locates in an area which is cleaner than a national ambient air quality standard (NAAQS), or a nonattainment permit if the source or modification locates in a nonattainment area. The Act defines a "stationary source" as "any building, structure, facility, or installation which emits or may emit any air pollutant." Section 111(a)(3).[1]

In *Alabama Power Co.* v. *Costle*, 636 F.2d 323 (D.C. Cir. 1979), the United States Court of Appeals for the District of Columbia Circuit held that EPA has discretion to define the constituent terms of the definition of "source" (*i.e.*, the terms "building," "structure," "facility," and "installation") so as to meet the purposes of the various NSR programs mandated by the Act. On August 7, 1980, EPA promulgated amended rules affecting PSD NSR, nonattainment NSR, and the construction moratorium to take into account the court's holding. 45 FR

[1] Where a state does not have an approved plan in place for cleaning up a nonattainment area, the Act imposes a moratorium on construction of major new sources and modifications in that nonattainment area (construction moratorium).

52676 (August 7 rules). For PSD purposes, EPA defined "source" in essence as an entire plant (the "plantwide" definition). But for nonattainment purposes, EPA defined "source" as both the entire plant and each piece of process equipment at the plant (the "dual" definition).[2]

The practical significance of these different definitions largely lies in the number of modifications each definition would bring in for review. EPA's August 7 rules define a "modification" as a significant net increase in emissions at a source. *See, e.g.*, 45 FR 52747. Since the PSD definition defines "source" in essence as a plant, only net increases occurring at the entire plant need a PSD permit. For example, if a plant increased emissions at one piece of process equipment, but reduced emissions by the same amount at another piece of process equipment at the plant, then there would be no net increase in emissions at the plant, and therefore no modification to the "source." But under the nonattainment definition, the piece of process equipment itself is a "source," which means that only equivalent reductions at that particular piece of process equipment would enable the source to avoid the need for a nonattainment permit. As a result, the nonattainment definition affords fewer opportunities for a source to use a reduction in emissions to compensate for an increase at the source, and therefore avoid the need for a permit.

EPA promulgated a plantwide definition for the PSD program pursuant to *Alabama Power*. *See* 636 F.2d at 397; 45 FR 52695, 52730, 52736 (August 7, 1980). But EPA adopted the more inclusive dual definition for nonattainment areas in order to most effectively use NSR to aid in the cleanup of nonattainment areas. *See* 45 FR 52697 (August 7, 1980). EPA asserted

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[2] Formally, for PSD purposes, EPA defined each of the terms "building," "structure," "facility," and "installation" as an entire plant. However, for nonattainment purposes, EPA defined "Building structure, or facility" as an entire plant and "installation" as a piece of process equipment.

that a narrow definition of source brings in more sources for review, which will enable states to ensure more reductions in emissions through new source permitting. These additional reductions from permitting were said to arise from the greater applicability of the provision in Section 173(1)(A) of the Act (which was adopted by most states) that a new source or modification must obtain offsetting reductions in emissions which are greater than the increase from the new source or modification. EPA further noted that the permit requirement also brings into play Section 173(3) of the Act, under which the owner of a proposed new source or modification must certify that all other sources owned, operated, or controlled by him are in compliance with the applicable State Implementation Plan. Finally, EPA felt that increased applicability of the construction moratorium through use of a narrow definition of source would serve as a strong incentive for states to develop plans to clean up their nonattainment areas.

However, on March 12, 1981, EPA proposed to delete the dual definition for nonattainment areas and to substitute a plantwide definition identical to that of the PSD program. 46 FR 16280. EPA stated that it could, by adopting a plantwide definition, reduce these regulatory burdens and complexities associated with NSR and the construction moratorium without interfering with timely attainment of the NAAQS in accordance with the Act. In particular, EPA argued that by bringing in more sources for review or subjecting them to the construction moratorium, the dual definition was discouraging replacement of older, dirtier processes with new cleaner ones. It thereby acted as a disincentive to new investment and modernization and retarded progress toward clean air. In addition, EPA noted that a source would still be subject to any applicable new source performance standards (NSPS) and that significant net increases at a plant as well as wholly new plants, still would undergo nonattainment review. Third, EPA stated that its proposal would simplify the regulatory process by adopting the same definitions for PSD and nonattainment permits. Finally, EPA stated that even if a state adopted a plant-

wide definition, it nonetheless had to demonstrate attainment of the NAAQS and reasonable further progress (RFP) towards attainment by the statutory deadlines. For these reasons, EPA concluded that the dual definition was unnecessarily burdensome, and so should be deleted.

*B. Reconstruction*

EPA's August 7 rules also required reconstructed or replacement facilities to undergo NSR in nonattainment areas as if they were new sources. Specifically, the rules provided that whenever a company rebuilt a "source" so that more than 50 percent of its capital cost represented new investment, that rebuilt source had to obtain a nonattainment permit. EPA did not adopt a similar provision for PSD, because few if any whole plants are likely to be rebuilt.

On March 12, 1981, EPA proposed to delete this requirement. EPA stated that since it was proposing to use a plantwide definition for nonattainment areas, and since few entire plants are likely to be rebuilt, there is little need for review of reconstructions. In addition, this change would further reduce the differences between PSD and nonattainment NSR.

**II. Today's Action**

*A. Definition of Source*

EPA has decided to adopt the plantwide definition of source and to delete the reconstruction requirement as it proposed last March. After evaluation of the comments received. EPA has concluded that two concerns warrant this approach to NSR.

First, today's action means that both the PSD and nonattainment programs will use the same definition of "source." This alone will reduce regulatory complexity. Sources will no longer have to figure out what an "installation" is, which should lessen any confusion engendered by EPA's August 7 rules.

Second, and more important, by removing the requirement that states adopt a dual definition, EPA is acting consistently

with the purposes of Part D of the Act. Congress expressly provided that states are to play the primary role in pollution control. Sections 101(a)(3), 101(b). It also intended that states retain the maximum possible flexibility to balance environmental and economic concerns in designing plans to clean up nonattainment areas. *See e.g.*, Sen. Rep. 95-127 at pp. 10-11; *cf. NRDC* v. *Train*, 421 U.S. 60 (1975). Today's action follows this mandate by allowing states much greater flexibility in developing their nonattainment area NSR programs and attainment demonstrations. Since demonstration of attainment and maintenance of the NAAQS continues to be required, deletion of the dual definition increases state flexibility without interfering with timely attainment of the ambient standards, and so is consistent with Part D.

This rulemaking in no way affects either the current status of any EPA-approved SIP or the state's duty to assure RFP and attainment of the NAAQS by the statutory deadlines. All state plans containing the dual definition and the reconstruction provisions remain fully valid after this rulemaking. States may, however, choose to adopt a plantwide definition, provided that they submit that change to EPA as a SIP revision.

States choosing to delete the dual definition must demonstrate that their plans, as revised, continue to demonstrate RFP and attainment. Many state plans are based in part upon a projection of reductions in emissions obtained through the state's NSR program. This projection in turn rested upon an anticipated number of permit applications. Use of a plantwide definition would mean that many sources will no longer need a permit. Unless counterbalanced by other consequences of the deletion (*e.g.*, more rapid construction of new clean emission units), this may result in the loss of reductions originally expected by the state. In other instances, where RFP demonstrations were more general in nature, states relied on the NSR program to assist in their enforcement efforts and to identify additional more efficient means to control emissions. In either case, a state's RFP demonstration, which was predicated on those assumptions for NSR coverage, might no longer

apply; and the state might have to obtain or guarantee those reductions in other ways (such as requiring additional reductions from existing sources and stepping up enforcement efforts). States changing from a dual to a plantwide definition must therefore reassess their general attainment strategies and revise them as necessary to ensure RFP and attainment by the statutory deadlines.

A related problem may arise if a state decides to rescind existing nonattainment permits. A modification which required a permit under the dual definition may not have needed one had the plantwide definition been in effect, and some states may choose to rescind those permits and reissue them with conditions more favorable to the affected sources (such as deleting the requirement that the source install the technology assuring the lowest achievable emission rate (LAER)). However, the emissions reductions required by that permit may have been included in the state's RFP demonstration, and rescission might therefore damage that demonstration. States should thus be careful that, in designing any rescission procedure, they do not interfere with RFP and attainment. Any such rescission procedure must be submitted to EPA as a SIP revision and must assure that each rescission is consistent with the state's RFP demonstration.[3]

*B. Reconstruction*

EPA is also taking a final action today to delete the requirement that reconstructed facilities (as that term is defined in the rules) be subject to nonattainment requirements. The rationale for that decision is the one offered in the proposal: Adoption of the plantwide definition means that the reconstruction requirement applies only to entire plants which are rebuilt. Since few if any such reconstructions are antici-

[3] Permit recessions granted under an EPA-approved permit recession procedure would not have to be submitted to EPA as a SIP revision.

pated, there is little reason to retain this requirement. In addition, deletion of the requirement makes the PSD and nonattainment rules the same in this respect.

As with the dual definition, some state plans may be based upon emission reductions obtained from the reconstruction provision. States choosing to delete this requirement should therefore assess and adjust their RFP and attainment demonstrations as necessary.

### III. Response To Comments

EPA received 81 comments in response to its March 12 proposal, the majority of which favored deletion of the dual definition and the reconstruction requirement. The particular comments, as well as EPA's response, are discussed below.

#### *A. Modernization*

Many commenters who agreed with the proposal stated that it would be conducive to modernization of existing plants and so would enhance economic efficiency. These commenters also agreed that the dual definition acted as a disincentive to replacement of outmoded dirty facilities with newer cleaner ones, and some cited specific examples where this in fact has happened. Other commenters, however, noted that EPA had cited no data to corroborate its claim that the dual definition impeded modernization, and argued, also without supporting data, that the direct cost of offsets and of the installation (pursuant to Section 173(2)) of technology resulting in LAER was so much less than the total cost of a modified plant that it did not act as a disincentive.

EPA believes that the examples provided by the commenters support its statement in the proposal that the dual definition impedes legitimate efforts to modernize existing plants. (*See, e.g.*, comments of Crown Zellerbach; Union Oil Corporation.) This is particularly true in areas subject to the construction moratorium, where plants cannot modernize a particular facility, even if emissions at the plant as a whole actually *decrease*. To deny construction to candidate modernization

projects which would cause no significant increase in air pollution at the plant, and which in some cases would produce a net air quality improvement, may call upon such projects to bear an unacceptably large part of the overall burden for cleaning up a nonattainment area. Accordingly, EPA has concluded that elimination of the dual definition requirement will remove a barrier to modernization of the nation's industrial base.

A related issue raised by some commenters was that deletion of the dual definition would actually result in more economic inefficiency in the nonattainment area as a whole. The argument here rests on two claims. First, installation of technology representing LAER means the new source will have lower emissions and thus need fewer offsets: sources not installing LAER would need more offsetting reductions to avoid the need for a permit. Deletion of the dual definition therefore would mean that more cost-effective reductions would be used up quickly, leaving fewer reductions available over the long term. This would make it more difficult for new sources to find needed offsets and so could actually impede growth over time: and if additional reductions were needed to attain the NAAQS, they could only be obtained by imposing additional controls on existing sources, controls which would require costly retrofits. Second, the proposal was alleged to favor large existing sources over new sources, because many existing sources have significant amounts of available emission reductions that can be used to avoid the need for a permit whereas new sources would always have to undergo nonattainment area NSR. This means that existing sources might use up all the available reductions, and so preclude all new construction.

The concerns raised by these commenters are at this point speculative, particularly in view of the fact that the commenters provided no data to support their claims. In addition, they contradict a central principle of economic efficiency, under which the cheapest and most cost-effective emission reductions should be allowed to be used first, not saved until some hypothetical future need develops while more expensive controls are used first. More importantly, given the structure of

the Act, EPA believes that the choice of whether to take the risks these commenters mention is one properly made by the states, not the federal government. If a state feels that the long-term risks of the plantwide definition outweigh its potential shorterm benefits, then that state may properly retain the dual definition. But this kind of decision is essentially based on economic factors, not air quality concerns, and so is appropriately left to the states. *Cf. Union Electric Co.* v. *EPA*. 427 U.S. 246 (1976).

*B. Regulatory Complexity*

Supporters of the proposal endorsed it as a means of simplifying the regulations, thereby reducing some of the confusion in the permit review process and eliminating an inconsistency with the PSD program. Other commenters asserted that the dual definition adds only slightly to the complexity of the regulations and that anyone who carefully reviews the regulations can readily understand the way in which the definition works.

EPA believes that elimination of the dual definition clearly simplifies what any objective observer would agree is a quite complex regulation. First, plants sometimes must get a PSD permit for one pollutant and a nonattainment permit for another pollutant. Using the same definition for PSD and nonattainment purposes simplifies the permit process. Second, by defining "source" in essence as an entire plant. EPA has eliminated the problem of determining what an "installation" is in a given situation.

*C. Application of Control Technology*

Many commenters agreed that adequate use of the most up-to-date control technology is assured, regardless of the applicability of nonattainment area NSR, because NSPS will cotinue to apply to many new or modified facilities. Other commenters argued, however, that there is no applicable NSPS for many categories of sources, and that NSPS is often not as stringent as LAER. These commenters also claimed that Congress intended that all new sources must install some

form of advanced pollution control technology, particularly in nonattainment areas where the maximum possible emmission reductions must be obtained.

EPA has embarked upon an expanded program of NSPS development. *See* 40 CFR 60.16. This program will assure that most major emitting source categories will be covered by an NSPS. Accordingly, EPA believes that eventually the NSPS program will ensure that new and modified sources will adequately apply state-of-the-art control technology. To the extent that the controls imposed are not as strict as LAER, the internal offsets needed to "net out" of NSR will make up the difference.

EPA agrees that in some cases an NSPS will be less stringent than LAER. But this comment is not wholly relevant, for while Congress intended that new or modified *sources* apply LAER, it left EPA discretion to define "source." As noted above, EPA believes that a plantwide definition of "source" is consistent with the purposes of the nonattainment provisions of the Act, and so comports with Congressional intent. Consequently, EPA's approach with regard to application of control equipment is consistent with the Act.

*D. Assuring Reasonable Further Progress and Attainment*

Many commenters who supported the proposal emphasized that the states will remain subject to the requirement that they demonstrate that each nonattainment area will attain the NAAQS as expeditously as practicable and will show reasonable further progress toward attainment. These commenters thus agreed with EPA that use of a plantwide definition need not interfere with the fundamental purpose of Part D of the Act (relating to nonattainment areas). Other commenters challenged EPA's analysis, arguing that most RFP analyses and attainment demonstrations are so imprecise that extensive NSR coverage is essential to assuring attainment and RFP. These commenters claimed that this imprecision is exacerbated by the fact that most Part D SIPs are based on deficient emission inventories. Therefore, the reviewing au-

thority cannot say with confidence that any opportunities for emissions reductions can be ignored. They added that this

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**[50769-70 omitted]**

Pursuant to the provisions of 5 U.S.C. 605(b), I hereby certify that this action will not have a significant economic impact upon a substantial number of small entities. These rules will reduce regulatory burdens since fewer sources will be subject to NSR and the construction moratorium. Since the requirements of the Clean Air Act apply to all sources defined as major, EPA did not have the additional flexibility to alter the applicability of these requirements to any small entities that meet the definition of major source.

Under Executive Order 12291, EPA must judge whether a regulation is "major" and therefore subject to the requirement of a Regulatory Impact Analysis. This regulation is not major because it reduces the coverage of nonattainment area NSR and the construction moratorium and so lessens regulatory burdens.

This action was submitted to the Office of Management and Budget (OMB) for review as required by the Order. Any comments from OMB to EPA and any EPA response are available for public inspection at the Central Docket Section, U.S. Environmental Protection Agency, West Tower, 401 M Street, S.W., Washington, D.C. 20460 (Docket A-81-14)

Pursuant to 5 U.S.C. 553(d)(1), this action is being made immediately effective because it relieves a restriction.

The rules being promulgated today are nationally applicable, and this action is based upon a determination of nationwide scope and effect. Under Section 307(b)(1) of the Clean Air Act, judicial review may only be sought in the United States Circuit Court of Appeals for the District of Columbia Circuit. Petitions for judicial review must be filed on or before December 14, 1981.

(Secs. 110(a)(2)(I), 172(b)(6), 173, 301(a) of the Clean Air Act, as amended, (42 U.S.C. 7410(a)(2)(I), 7502(b)(6), 7503, 7601(a)); Sec. 129(a)(1) of the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (August 7, 1977))

Dated: October 3, 1981.

Anne M. Gorsuch,
*Administrator.*

## PART 51—REQUIREMENTS FOR PREPARATION, ADOPTION, AND SUBMITTAL OF IMPLEMENTATION PLANS

### Appendix S [Amended]

1. Section II, Subsection A of the Emissions Offset Interpretative Ruling, 40 CFR Part 51 Appendix S, as revised 44 FR 3274 (January 16, 1979), 45 FR 31307 (May 13, 1980), 45 FR 52741 (August 7, 1980), and 45 FR 59879 (September 11, 1980) is amended as follows:

a. By changing the words "Building, structure or facility" at the beginning of paragraph 2 to read "Building, structure, facility or installation";

b. By removing paragraph 3 and renumbering the succeeding paragraphs accordingly; and

c. By removing paragraphs 9 and 10 and renumbering the succeeding paragraphs accordingly.

### § 51.18 [Amended]

2. Section 40 CFR 51.18(j)(1) is amended as follows:

a. By changing the words "Building, structure or facility" at the beginning of paragraph (j)(1)(ii) to read "Building, structure, facilty or installation";

b. By removing paragraph (j)(1)(iii) and renumbering the succeeding subparagraphs accordingly; and

c. By removing paragraphs (j)(1)(ix) and (x) and renumbering the succeeding subparagraphs accordingly.

## PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

**§ 52.24 [Amended]**

3. Section 40 CFR 52.24(f) is amended as follows:

a. By changing the words "Building, structure or facility" at the beginning of paragraph (f)(2) and to read "Building, structure, facility or installation";

b. By removing paragraph (f)(3) and renumbering the succeeding subparagraphs accordingly; and

c. By removing paragraphs (f)(9) and (10) and renumbering the succeeding subparagraphs accordingly.

**[FR Doc. 87-29706 Filed 10-13-81; 8:45 a.m.]**

**3. Selected EPA Provisions Governing Part D State Plans, Including Definitions Deleted By EPA's 1981 Rulemaking; Adopted August 7, 1980 (45 Fed. Reg. 52676) And Codified At 40 C.F.R. §§ 51.18(j)(1)(i), (ii), (iii), (vi), (ix) (1981):**

**§ 51.18 Review of new sources and modifications.[1]**

* * *

(j) State Implementation Plan provisions satisfying sections 172(b)(6) and 173 of the Act shall meet the following conditons:

(1) All such plans shall use the specific definitions. Deviations from the following wording will be approved only if the state specifically demonstrates that the submitted definition is more stringent, or at least as stringent, in all respects as the corresponding definition below:

(i) "Stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.

(ii) "Building, structure, or facility" means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e., which have the same two-digit code) as described in the *Standard Industrial Classification Manual*, 1972, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0066 and 003-005-00176-0, respectively).

(iii) "Installation" means an identifiable piece of process equipment.

* * *

(vi)(*a*) "Major modification" means any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.

* * *

(ix) "Reconstruction" will be presumed to have taken place where the fixed capital cost of the new components exceeds 50 percent of the fixed capital cost of a comparable entirely new stationary source. Any final decision as to whether reconstruction has occurred shall be made in accordance with the provisions of 40 CFR 60.15(f)(1)-(3). A reconstructed stationary source will be treated as a new stationary source for purposes of this subsection. In determining lowest achievable emission rate for a reconstructed stationary source, the provisions of 40 CFR 60.15 (f)(4) shall be taken into account in assessing whether a new source performance standard is applicable to such stationary source.

## C. LIST OF CORPORATE PETITIONERS' PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES PURSUANT TO SUPREME RULE 28.1

The following list is submitted pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States. Listed are the parent companies, non-wholly owned subsidiaries and affiliates of the corporate petitioners upon whose behalf the foregoing Petition is filed. The corporate petitioners are grouped with the lead petitioner with whom they joined in moving to intervene as respondents in the proceedings in the United States Court of Appeals for the District of Columbia Circuit.

**Corporate Petitioners Who Were Intervenor-Respondents Together With The American Iron And Steel Institute.**[1]

ARMCO INC.

*Subsidiaries and Affiliates*

Oregon Metallurgical Corporation

JONES & LAUGHLIN STEEL CORPORATION, a division of
JONES & LAUGHLIN STEEL, INCORPORATED

*Parent Company*

The LTV Corporation

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[1] The above list includes only publicly held domestic subsidiaries and affiliates of these corporations. Corporate petitioner United States Steel Corporation does not have any domestic corporate affiliates or subsidiaries voting securities of which are publicly traded. Some of the eight corporate petitioners that intervened together with the American Iron and Steel Institute may have non-publicly held or foreign affiliates and subsidiaries. A list of these companies can be compiled and supplied upon request.

**Corporate Petitioners Who Were Intervenor-Respondents Together With The American Petroleum Institute:**[2]

ATLANTIC RICHFIELD COMPANY

*Subsidiaries and Affiliates*

Hardy Oil Company
Sinclair Venezuelan Oil Company
Anaconda Iron Ore (Ontario) Limited
Bingham Development Company
Caribou-Chaleur Bay Mines Ltd.
Caribou-Smith Mines Ltd.
Chile Copper Company
Defender Mining and Milling Corporation
Dragon Consolidated Mining Company
Green Cananea Copper Company
Mayflower Mining Company
Middle Swansea Mining Company
New Bingham Mary Mining Company
North Lily Mining Company
Park Cummings Mining Company
Park Premier Mining Company
Patten Mining Company
Smoke House Copper Mining Company
West Mayflower Mining Company
Badger Pipe Line Company
Blair Athol Coal Pty. Ltd.
Compania de Petroleo Ganso Azul, Ltda.
Compania Mexicana de Petroleo "El Charro", S.A.
Flower Street Ltd.
Gravity Adjustment Inc.
Hydrokem Performance Chemicals Company
Iricon Agency Ltd.
Kenai Pipe Line Company
R. W. Miller (Holdings) Limited
Montoro, Empresa Para La Industria Quimica, S.A.
The Observer Magazine Limited
Platte Pipe Line Company
Sao Raimundo Agroindustrial Ltda.
Sinclair Venezuela Oil Company

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[2] The above list includes these corporate petitioners' parent companies and publicly-traded subsidiaries and affiliates.

Tecumseh Pipe Line Company
Texas, New Mexico Pipe Line Company
Alyeska Pipeline Service Company
Colonial Pipeline Company
Cook Inlet Pipeline Company
Delaware Bay Transportation Company
Dixie Pipeline Company
East Texas Salt Water Disposal Company
Lavan Petroleum Company
Oil Shippers Service, Inc.
Trans Mountain Oil Pipe Line Company

CONOCO INC.

*Parent*

E.I. du Pont de Nemours & Company

*Subsidiaries and Affiliates*

A/S Soties Plass 2
Associated Petroleum Terminals Ltd.
Benzene Marketing Co. Ltd.
Big Sky of Montana Realty, Inc.
Bishop Coal Company
Calcasieu Chemical Corporation
Carbon Black Espanola, S.A.
Cardinal River Coals, Ltd.
Cit-Con Oil Corporation
Cliffe Storage Ltd.
Colonial Pipeline
Compagnie Francaise du Carbon Black, S.A.
Conch International Methane, Ltd.
Conch L.N.G.
Condea Chemie, GmbH
Conoco Exploration, Ltd.
Conrhein Coal Co.
Continental Columbia Carbon Nederland, B.V.
Contochu, Inc.
Crude Oil Terminals (Humber) Ltd.
Dixie Pipeline
Explorer Pipeline Company
Felix Oil Company
Harmar Coal Company
Humber Oil Terminals Trustee Ltd.
Iranian Investment Corp.

Iranian Oil Participants Ltd.
Iranian Oil Services (Holdings) Ltd.
Iricon Agency, Ltd.
Itmann Coal Company
K/s Statfjord Transport A.S. & Co.
Kettleman North Dome Association
Lake Charles Pipe Line
Long Beach Oil Development Company
Lucky Continental Carbon Co., Ltd.
Maritime Protection (PTE) Ltd.
Maritime Protection A/S
Maritime Protection Inc.
Mathies Coal Company
Neptune Bulk Terminals (Canada) Limited
Nippon Aluminum Alkyls, Ltd.
Nissan Conoco Corporation (CONSAN)
Oasis Oil Co. of Libya, Inc.
Oil Shippers Service, Inc.
OMW (Oberrheinische Mineraloelwerke GmbH)
Pasa Petroquimica Argentina, S.A.
Petrocokes, Ltd.
Petroleum Storage Ltd.
Petroleum Terminals, Inc.
Petroquimica Espanola, S.A. (PETRESA)
Pioneer Pipe Line Company
Platte Pipe Line
Seadock, Inc.
Seaway Pipeline, Inc.
Selang Ltd.
Southern Facilities, Inc.
Statfjord Transport A.S.
Stavangereske Westamarine A/S
Sulitjelma Elektronikk A/S
T.A.L.
T.A.L. (Austria)
T.A.L. (Italy)
T.A.L. (Luxembourg)
Texas Offshore Port, Inc.
The Standard Shale Products Company
Tidelands Royalty Trust
Tongue River Holdings, Inc.
Tongue River Railroad
Toyo Continental Carbon, Ltd.
Union National Bank Building

Warwickshire Oil Storage Ltd.
West Shore Pipe Line
Westmarin A/S
Yellowstone Pipe Line

EXXON CORPORATION

(includes Exxon Company, U.S.A., a division of Exxon Corporation)

*Subsidiaries and Affiliates*

Imperial Oil Limited
Reliance Electric Company
Exxon Pipeline Company

GULF OIL CORPORATION

*Subsidiaries and Affiliates*

Gulf Canada Limited/Gulf Canada Limitee
China Gulf Plastics Corporation
Asia Polymer Corporation
Chinhac Chemical Company, Ltd.
Plastigama S.A.
Taiwan VCM Industries Corporation
Bio Research Center Company, Ltd.
Laurel Pipe Line Company
Platte Pipe Line Company
Venezuela Gulf Refining Company
West Texas Gulf Pipe Line Company
A/S Jargul
A/S Jargul and Co. K/S
AB Djurgardsberg
Adela Investment Company, S.A.
Agricultural Anhydrous Ammonia Co. Ltd.
Alberta Products Pipe Line Ltd.
Alberta Underground Storage Limited
Allied-General Nuclear Services (partnership)
Andogas S.A.
Autobahn-Raststaette Wurenlos Ag.
Burgan Pension Fund Trustees Limited
Canada Systems Group (EST) Limited
Cansulex Limited
Carnduff Gas Limited
Central Pipeline Company Limited, The
China Gulf Oil Company Limited
Colonial Pipeline Company

Commercial Alcohols Limited
Compagnie D'Investissement Combustibles De Reacteurs A Haute Tp.
Components Industriales Mexicanos, S.A.
"Condor" Industria Quimica, S.A.
Crediton Enterprises, Inc.
Delaware Bay Transportation Company
Det Gronlandske Olieakieselskab
Dixie Pipeline Company
Econ Oil (1977) Inc.
Emery Joint Venture
Ethyleen Pijpleiding Maatschappij (Belgium) S.A.
Ethyleen Pijpleiding Maatschappij (Nederland) B.V.
Explorer Pipeline Company
G&C Realty Limited
GAE Propane Blanchard Ltee.
GEA/Power Cooling Systems, Inc.
Glen Park Gas Pipe Line Company Limited
Gobles Oil and Gas Limited
G.S. Equipment and General Supply
Gulf Canada Petroleum Inc.
Gulf Canada Resources Inc./Resources Gulf Canada Inc.
Gulf Canada Resources Leasing Inc.
Gulf Oil Canada-Greenland A/S
Gulf Oil Zaire S.A.R.L.
Harshaw Galvanotecnia S.A.
Harshaw-Juarez S.A. de C.V.
Harshaw Murata Co., Ltd./Harshaw Murata Kabushiki Kaisha
Harshaw Quimica Ltda.
Hochtemperatur Reaktorbau GMBH
Ice Pinturas, S.A.
Ico Pinturas, S.A.
Industrias Veneedor S.A.
Interprovincial Pipe Line Limited
Interquimica S.A.
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Keydril (Nigeria) Limited
Kuwait Oil Company Limited
Kuwait Oil Company Trustees Limited
Mainline Pipelines Limited
Maple Insurance Limited
Mid-Atlantic Chemical Corporation S.A.

Mid-Valley Pipeline Company
Midwest Carbide Corporation
Montreal Pipe Line Limited
Morrow Fuel Oil Sales Ltd.
Mozambique Gulf Oil
Newfoundland Propane Limited
North River Energy Company
Northward Development Ltd.
Northwest Propane Ltd.
Northwest Terminals Ltd.
Nova, An Alberta Corporation
Oil Shippers Service, Inc.
Oklahoma Nitrogen Company (partnership)
Paloma Pipe Line Company
Panindustrial, S.A.
Peace Pipe Line, Ltd.
Pembroke Capital Company
Pembroke Cracking Company
Penrith Enterprises, Inc.
Permapint, S.A.
Petromont, Inc.
Petrosil Oil Company Limited
Pol Transport AB
Polyquimicos, S.A.
Produtos Quimicos Somox, Ltda.
Pyro Power Corporation
Raffinerie de Cressier S.A.
Redwater Water Disposal Company Limited
Resinas Andinas S.A.
Rimbey Pipe Line Co., Limited
Rio Blanco Oil Shale (partnership)
Ripon Enterprises, Inc.
SARNI S.p.A.
Servico Limited
Solvent Refined Coal International, Inc.
Sorrenio Electronics, Inc.
Sunrise International Company Limited
Superior Propane Limited
Svensk Petroleum Administration A.B.
Svensk Petroleum Largring Tre A.B.
Svensk Petroleum Forvalting A.B.
Syncrude Canada, Ltd.
Taita Chemical Company, Ltd.
Taiwan Plasticizer Corporation

Taiwan VCM Industries Corporation
Trans Mountain Pipe Line Company, The
Trans-Northern Pipe Line Company
Western G.M.C. Pontiac Buick Ltd.

MARATHON OIL COMPANY

*Parent*

United States Steel Corporation

*Subsidiaries and Affiliates*

Petroleum Terminals, Incorporated
The Airport Company of Hilton Head Island, Inc.
Arctic LNG Transportation Co.
Automotive Fuel Corporation
Automotive Fuel Corporation of Delaware, Inc.
Badger Pipe Line Company
Cheker-Imperial Oil Co. of Alabama
Cheker-Imperial Oil Co. of Arkansas
Cheker-Imperial Oil Co. of Georgia
Cheker-Imperial Oil Co. of Iowa
Cheker-Imperial Oil Co. of Kansas
Cheker-Imperial Oil Co. Mississippi
Cheker-Imperial Oil Co. of Missouri
Cheker-Imperial Oil Co. of Nebraska
Cheker-Imperial Oil Co. of Tennessee
Cheker Oil Company
Cheker Oil Company of Delaware, Inc.
Cheker Oil Company of Florida, Inc.
Cheker Oil Company of Indiana, Inc.
Cheker Oil Company of Michigan, Inc.
Cheker Oil Company of Ohio, Inc.
Cheker Oil Company of Wisconsin, Inc.
City Point Oil Terminal, Inc.
Cook Inlet Pipe Line Co.
Dor Rae Realty, Ltd.
Ecol, Inc. (Mississippi)
Explorer Pipeline Company
Globe Oil Company, U.S.A.
Gravcap, Inc.
Green Bay Terminal Corp.
Hilton Head Island Realty, Inc.
Hilton Head Management Co., Inc.
Kenai LNG Corp.
Key Pipe Line Co. Ltd.

Kroll Glass Service, Inc.
Locap, Inc.
Loop Inc.
Marco South, Inc.
Oil Insurance Limited
Oil Shippers Service, Inc.
Oklahoma Oil Co.
Pilot Oil Corporation
Platte Pipe Line Co.
Polar LNG Shipping Corporation
Port Oil Inc.
Qualbank, Inc.
Redwater Water Disposal Company Limited
Russell Stewart Oil Co.
Sandcastle Land Company, Inc.
Tideland Realty of Hilton Head, Inc.
U-Save, Inc.
Webster Service Stations, Inc.
West Shore Pipe Line Co.
Wolverine Pipe Line Co.
CLAM Pet. Company
Compania Iberica Refinadora de Petroleos, S.A.
Deutsch Transalpine Olleitung GmbH
Oasis Oil Company of Libya, Inc.
Societa Italiana per l'Oleodotto Transalpino, S.p.A.
Transalpine Finance Holdings S.A.
Transalpine Olleitung in Osterreich GmbH
Cope Petrolera S.A.
Domex Packaging Ltd.
P.V. Commodity Systems Ltd.
Magnorth Pet. Ltd.
Panwest Pty. Limited
Sage Creek Coal Limited
Valley Beach, Inc.

## MOBIL OIL CORPORATION[3]

*Subsidiaries and Affiliates*

AB Djurgardsberg
Abu Dhabi Petroleum Company Limited
Adria-Wien Pipeline Gesellschaft m.b.H.
City Point Oil Terminal, Inc.
AIMCO (ALPHA) Shipping Company
AIMCO (OMEGA) Shipping Company
Aircraft Fuel Supply B.V.
Airtankdienst Koln
AK Chemie GmbH
AK Chemie GmbH & Co KG
Akauma Rekisei Kogyo Kabushiki Kaisha
Alexandroupolis Petroleum Installation S.A.
Allied Asphalts Limited
Alpa Alet Ve Dayanikli Tuketim Mamulleri Pazarlama A.S.
Altona Petrochemical Company Limited
Alyeske Enterprises, Inc.
Alyeska Pipeline Service Company
Ankara Gaz Satis Anonim Sirketi
Arabian American Oil Company
Arabian International Maritime Company Limited
The Arabian Petroleum Supply Company (S.A.)
Arabian Shipping & trading Company S.A.
Arabian Trading Company S.A.
Aral Aktiengesellschaft
A/S Fjellvegen
A/S Kongens Plass I
A/S Moretral
Ammenn GmbH
The Associated Octel Company Limited
Associated Octel Company (Plant) Limited
ATAS-Anadolu Tasfiyehanesi Anonim Sirketi

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[3] Mobil Oil Corporation is a wholly owned subsidiary of Mobil Corporation which is publicly held. Listed above are the affiliates and subsidiaries of Mobil Corporation, Mobil Oil Corporation, and their affiliates and subsidiaries which are or may be publicly held. For purposes of this list only companies in which a five percent (5%) or greater interest is held are considered.

Atlas Sahara S.A.
Australasian Petroleum Company Proprietary Limited
Austrialian Synthetic Rubber Company Limited
Autobahn-Betriebe Gesellschaft m.b.H.
Aviation Fuel Services Limited
Aygaz Anomim Sirketi
B.V. Beheersmaatschappij MOBEM
Basrah Petroleum Company Limited
Bataan Refining Corporation
Bayerische Erdgasleitung GmbH
Bin Sulaiman Mobil Towers
Bayerische Mineral Industrie A.G.
Bostadsrattsforeningen Basunen, Malmo
Bostadsrattsforeningen Forarsatet, Orby
Bostadsrattsforeningen Silverskatten, Trellebor
Bostadsrattsforeningen Skepparegarden, Norrkoping
Brazos Heights Housing Incorporated
Brussels Airfuels Service S.C.
Buffalo River Improvement Corporation
Canner's Steam Company, Incorporated
Cansulex Limited
Canyon Reef Carriers, Inc.
Cartoenvases Valencia, S.A.
Carton de Colombia, S.A.
Carton de Venezuela, S.A.
Cartones Nationales, S.A.
Celmisia Shipping Corporation
Central African Petroleum Refineries (Pvt) Limited
Central Kagaku Kabushiki Kaisha
Cercera S.A.
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Chuo Nenryo Gas Kabushiki Kaisha
Colombianos Distribuidores de Combustibles, S.A. (CODI)
Colonial Pipeline Company
Combustibles Colmerauer
Comet-Brennstoffdienst GmbH
Commodore Maritime Company, S.A.
Compagnie Africaine de Transport Cameroun
Compagnie D'Entreposage Communautaire
Compagnie Immobiliere (Comimmo)
Compagnie Regionale de Distribution de Produits Petroilers-C.O.R.E. Dis.
Compagnie Rhenane de Raffinage

Compagnie Senegalaise des Lubrifiants (C.S.L.)
Compania Colombiana de Empaques Bates, SSA
Compania de Lubricants de Chile Limitada (Copec-Mobil Ltda.)
Compania Mexicana de Especialidades Industriales, S.A. de C.V.
Consortium Raymond Duez
Constructora Calle 70 S.A.
Cook Inlet Pipe Line Company
CORCOP
Corrugadora de Carton, S.A.
Croager Bros. Limited
C.R.C. Lyon Chauffage
CRCP
Cyprus Petroleum Refinery Limited
D. Muhlenbruch GmbH
D. Muhlenbruch GmbH & Co. KG
Dai Nippon Jushi K.K.
De. Ba. Deposito de Bari S.p.A.
Depot Petrolier de Mourepiane
Depot Petrolier du Gresivaudan
Depot de Petrole Cotiers
Depots Petroliers de La Corse (DPLC)
Deutsche Mobil Oil Exploration Ireland Ltd.
Deutsche Pentosin-Werke GmbH
Deutsche Transalpine Oelleitung GmbH
Dicomi S.r.l.
Dixie Pipeline Company
Drivmedelscentralen AB
Dukhan Services Comany
East Japan Oil Development Company Ltd.
Eastern Lease Company Ltd.
Emoleum (Asphalts) Limited
Entrepot Petrolier de Chambery
Entrepot Petrolier de Dijon
Entrepot Petrolier de Mulhouse (E.P.M.)
Entrepot Petrolier de Nancy
Entreprise Jean Lefebvre
Erdgas-Verkaufs-Gesellschaft mbH
Erdoel-Lagergesellschaft mbH
Erdoel-raffinerie Neustadt GmbH & Co. oHG
Erdoelbetrieb Reitbrook
Erdoelraffinerie Gesellschaft mbH in Liquidation
Etablissments Bouthenet
Etablissments Nicol and Cie

Etablissments Wagner
Ets. R. Saillard
Faavang Autoverksted A/S
FACEL
Fairwind Maritime Company, S.A.
Felix Oil Company
Filtroleo-Sociedade Portuguesa de Filtros Lda.
Filtros De Costa Rica S.A.
Finsbury Printing Limited
Finsbury Printing Limited
Fountain Garage (Alfreton Road)
Fountain Garage (East Park) Ltd.
Fountain Garage (Leyton)
Fountain Garage (Meadowhead) Ltd.
Fountain Garage (Mercury) Ltd.
Fountain Garage (Newbury Park) Ltd.
Fountain Garage (Stirchley) Ltd.
Frome-Broken Hill Company Proprietary Limited
Froehmesser Mineraloelhandels GmbH & Co. KG
Fruehmesser GmbH
Fuso Operations Kabushiki Kaisha
Futuro Enterprises (Christchurch) Ltd.
Futuro Homes (N.Z.) Ltd.
Gaz Aletleri Anonim Sirketi
Geomines-Caen
Geovexin
Ghana Bunkering Services Limited
Goteborgs Branslesortering AB
Groupement Immobilier Petrolier G.I.P.
Groupement Petrolier Aviation G.P.A.
Groupement Petrolier De Brest (GPB)
H.E. Oils Limited
Handelmaatschappij Jugenholtz & Co. B.V.
Heizoel-Handelsgessellschaft mbH
Hellas Gas Storage Company S.A.
Highgate Associates, Ltd.
Home Counties Petroleum Products Limited
Hormoz Petroleum Company
Hydranten-Betriebs-Gesellschaft, Flughafen Frankfurt
Imperial Gas Co. of P.R., Inc.
Industria de Carbon del Valle Cauca, S.A.
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Iranian Oil Services Limited

Iraq Petroleum Company, Limited
Iraq Petroleum Pensions Limited
Iraq Petroleum Transport Company Limited
Island Exploration Company Proprietary Limited
Istanbul Petrol ve Makine Yasglari Limited Sirketi
Japan Airport Fueling Service Co. Limited
Japan Solar Energy Co., Ltd.
J.E.C.O.P.
K. Allan & Company Limited
K.K. Sankyo Plastics
K.K. Toresen
Kanto Kyguns Sekiyu Hambai K.K.
Kanto Oil Pipeline Co., Ltd.
Kawasaki Kygnus Sekiyu Hambai Kabushiki Kaisha
Keihin Kygnus Sekiyu Hambai Kabushiki Kaisha
Keiyo Sea Berth Company, Limited
Kettleman North Dome Association
Klaus Koehn GmbH
Klaus Koehn GmbH & Co. Mineraloel KG
Kobe Port Service Kabushiki Kaisha
Kurt Ammenn GmbH & Co. K.G.
Kygnus Ekika Gas Kabushiki Kaisha
Kygnus Kosan Kabushiki Kaisha
Kygnus Sekiyu Kabushiki Kaisha
Kyokyto Petroleum Services Overseas, Ltd.
Kyokuto Sekiyu Kogyo Kabushiki Kaisha
Les Nouveaux Comptoirs Petroliers
Les Supermarches De Cote D'Ivoire
Likit Petrol Gaxi ve Yakit Ticaret A.S.
Lubricants de Sur, S.A.
Marceaux & Cie
Matco Tankers (U.K.) Limited
Maury Manufacturing Company, Inc.
Mediterranean Refining Company
Meentzen & Franke GmbH & Co.
Michael Beecham Limited
Mobil Ami, S.A.
Mobil Atlas Sociedad Anonima de Capital Variable
Mobil Chemie Belgie N.V. and Mobil Chimie Belge S.A.
Mobil Comercio, Industria e Servicos Ltda.
Mobil Gaz-Mobil Petrol Gazlari Anonim Sirketi
Mobil Korea Lube Oil Industries Inc.
Mobil Motor Rest AG.
Mobil Oil Angola, SARL
Mobil Oil Cameroun

Mobil Oil Cote d'Ivoire
Mobil Oil Dahomey
Mobil Oil Djibouti, S.A.
Mobil Oil Francaise
Mobil Oil Gabon
Mobil Oil Ghana Limited
Mobil Oil Haute Volta
Mobil Oil Holdings, S.A.
Mobil Oil Mali
Mobil Oil Maroc
Mobil Oil Mauritanie
Mobil Oil Niger
Mobil Oil Nigeria Limited
Mobil Oil Nord-Africaine
Mobil Oil Phillippines Inc.
Mobil Oil Portuguesa, S.A.R.L.
Mobil Oil Rwanda-Burundi (S.A.R.L.)
Mobil Oil Senegal
Mobil Oil Tchad
Mobil Oil Togo
Mobil Nile Oil Company
Mobilrex
Mobil Tunisie
Mobil Tyco Solar Energy Corporation
Modern Buildings Membranes, Ltd.
Molinos de Carton y Papel, S.A.
Morem
Mosul Petroleum Company Limited
Motel Rest SA
Motrate Products Limited
Mt. Marrow Blue Metal Quarries Pty.
Ndola Oil Storage Company Limited
Near East Development Corporation
New Zealand Refining Company Limited, The
New Zealand Synthetic Fuels Corp. Ltd.
Nichimo Sekiyu Seisei Kabushiki Kaisha
Nippon Unicar Company Limited
Norddeutsche Erdgas-Aufbereitungs GmbH
Nordic Storage Company Ltd.
Nottingham Gas Limited
N.V. Rotterdam-Rijn Pijpleiding Maatschappij
N.V. Socony-Standard-Vacuum Oil Company
Occidental de Empaques, Ltda.
Octel Associates

Octel S.A.
Oil Kol (Proprietary) Limited
Oil Service Company of Iran (Private Company)
Oldenburgische Erdoel Gesellschaft mit beschrankter Haftung
Olympic Pipe Line Company
Osage Pipe Line Company
P.T. Arun Natural Gas Liquefaction Company
P.T. Stanvac Indonesia
Paloma Pipeline Company
Pars Investment Corporation
Pembalta Gas System No. 1 Ltd.
Pembalta Gas System No. 3 Ltd.
Pembalta Gas System No. 4 Ltd.
Pembalta Gas System No. 5 Ltd.
Pembalta Gas System No. 6 Ltd.
Perrietti Petroli S.p.A.
Petrocab
Petrogas Processing Ltd.
Petroleum Development (Cyprus) Limited
Petroleum Refineries (Australia) Proprietary Limited
Petroleum Services (Middle East) Limited
Petroleum Tankship Company Inc.
Petromin Lubricating Oil Company
Petromin Lubricating Oil Refining Company
Petromin-Mobil Yanbu Refinery Company Ltd.
Pipe-Lines de la Pallice
Plegadizos para la Industria S.A.
Poly Oil Chimie (P.O.C.)
Qatar Petroleum Company Limited
Qualbank, Inc.
Ragosine Oil Company Limited
Rainbow Pipe Line Company, Ltd.
Randhurst Corporation
Reforestadora Andina, S.A.
Reforestadora del Cauca, S.A.
Rhodes Petroleum Installation S.A.
Rivers Court Estates, Limited
Roe Lubricants Limited
Rohel-Aufsuchungs Gesellschaft mbH
Ruhrgas Aktiengesellschaft
S&M Pipeline Limited
S.A. Mas & Cie
S.A.M. Lebreton

Samarco (Alpha) Shipping Company
Samarco (Beta) Shipping Company
Sanwa Kasei Kogyo Kabushiki Kaisha
SARL Garage Pineau
Sarni S.p.A.
Saudi Arabian Maritime Company
Saudi Can Company, Ltd., The
Saudi Chemicasl Industries Company Limited
Saudi Maritime Company Ltd.
Saudi Tankers Limited
Saudi, Yanbu Petrochemical Company
Schubert Kommanditgesellschaft
S.C.I. Du Fonds Du Val
Segher de Mexico, S.A. de C.V.
Seibu Kygnus Sekiyu Hambai Kabushiki Kaisha
SENERCO
Seram Societa per Azioni (S.p.A.)
Sierra Leone Petroleum Refining Company Limited, The
R. Simonnet & CIE
Sociedade Portugal Marrocos SARL
Societa Italiana per l'Oleodotto Transalpino, S.p.A.
Societe Africaine de Rarrinage
Societe Agicole Des Entreprises Petrolieres (S.A.D.E.P.)
Societe Anonyme Etablissments Nicol and Cie
Societe Belge de Transport par Pipeline S.A.
Societe Camerounaise des Depots Petroliers (S.C.D.P.)
Societe Camerounaise Equatoriale De Fabrication De Lubrifiants "S.C.E.F.L."
Societe Civile de Mustapha
Societe Civile Immobiliere Courcelles-Etoile
Societe Civile Immobiliere de Construction de 34 Avenue de General Leclerc a Boissy-St-Leger
Societe Civile Immobiliere de Construction "La Residence Brune"
Societe Civile Immobiliere du 10 Bd. de la Republique A La Garenne-Colombes
Societe Civile Immobiliere Kleber-Etoile
Societe Civile Immobiliere La Fontaine Saint Lucien
Societe Civile Immobiliere Mobile
Societe Dahmoneenne d'Entreposage de Produits Petroliers
Societe d'Arement Fluvial et Maritime "SOFLUMAR"
Societe d'Entreposage d'Hydrocarbures de Bingo (SEHBI)

Societe de Construction & de Gestion CB 12
Societe de Distribution Castelroussine (SODICA)
Societe de Gaz D'Oceanic (SOGADOC)
Societe de Manutention de Carburants Aviation (S.M.C.A.)
Societe de Manutention de Carburants Aviation Dakar-Yoff
Societe de Manutention de Carburants Aviation de Tahiti (SOMCAT)
Societe de Maperizlx d'Etancheite Pour Le Entreprises (Meple)
Societe d'Entreposage de Bobo-Dioulasso (S.E.B.)
Societe d'Entreposage de San Pedro (SESP)
Societe d'Entreposage Petrolier au Burundi
Societe de Renovation D'Emballages Metalliques (REM)
Societe d'Habitations a Loyer Modere de la Seine Maritime
Societe des Bitumes et Cut-Backs du Cameroun
Societe des Establissments Goux
Societe Des Huiles Lemahieu
Societe de Pipe-Line Sud-Europeen
Societe Francaise Stoner-Mudge
Societe Gabonaise d'Entreposage de Produits Petroliers
Societe Gabonaise de Raffinage
Societe Industrielle des Asphaltes et Petroles de Lattaquie (Syrie) S.A.
Societe Ivoirienne de Fabrication de Lubrifiants (S.I.F.A.L.)
Societes Ivoirienne de Raffinage
Societe Mauritanienne d'Entreposage de Produits Petroliers
Societe Nationale de Raffinage (Sonora)
Societe Nouvelle Raffinereie Merdionale De Ceresines (RMC)
Societe Novodis
Societe Pizo De Formulation De Lubrifiants (PIZOLUB)
Societe Regionale De Produits Petroliers
Societe Regionale de Produits Energetiques
Societe Tehadienne D'Entreposage de Produits Petroliers
Societe Tahitienne de Depots Petroliers
Societe Togalaise D'Entreposage (STE)
SOMODIP
Sonarep (South Africa)(Proprietary) Limited
SONEX

South African Oil Refinery (Proprietary) Limited
South Saskatchewan Pipe Line Company
South West Africa Road Binders (Proprietary) Limited
Statfjord Transport A.S.
SStation-Service Lunes
Sydney Metropolitan Pipeline Pty. Ltd.
Syria Petroleum Company Limited
T.R. Miller Mill Company, Inc.
Tanklagergesellschaft Koln-Bonn
Tecklenburg GmbH
Tecklenburg GmbH & Co. Energiebedarf K.G.
Texoma Pipe Line Company
Thailand Lubricant Products Limited
Thailand Solvent Products, Ltd.
Thums Long Beach Company
Toa Nenryo Kogyo Kabushiki Kaisha
Tohko Plastics Co., Ltd.
Tonen Energy Internationsl Corp.
Tonen Sekiyu Kagaku Kabushiki Kaisha
Tonen Tanker Kabushiki Kaisha
Tonen Technology Kabushiki Kaisha
Total Centrafricaine de Gestion (TOCAGES)
Toulouse-Distribution Produits Petroliers
Toyoshina Film Co., Ltd.
Tradewind Maritime Co., S.A.
Transalpine Finance Holdings S.A.
Transalpine Oelleitung in Oesterreich Gessellschaft m.b.H.
Trans-Arabian Pipe Line Company
Transgas Umschlas-Lager-Und Transport Gessellschaft mbH
Turkish Petroleum Company Limited
Twifo Oil Plantations Ltd.
UBAG Unterflur Betankungsanlage Flughafen Zurich
Union Grafica, S.A.
United Kingdom Oil Pipelines Limited
W.A.G. Pipeline Pty. Ltd.
Wako Kasei Kabushiki Kaisha
Wadohjushi Kabushiki Kaisha
Werner Weidemann Mineraloelvertrieb G.m.b.H.
West Shore Pipe Line Company
Wolverine Pipe Line Company
Wyco Pipe Line Company
Zaire Mobil Oil
Zaire Services Des Entreprises Petrolieres

PHILLIPS PETROLEUM COMPANY

Subsidiaries and Affiliates

Acurex Corporation
Aero Oil Company
Alyeska Enterprises, Inc.
Alyeska Pipeline Service Company
Arctic LNG Transportation Company
Bonny LNG Ltd. (P.P. Worldwide Gas Ltd.)
Bruin Carbon Dioxide Sales Corporation
Calatrava Empresa Para la Industria Petroquímica, S.A.
Canada Western Cordage Co., Ltd.
Canyon Reef Carriers Inc.
Cochin Refineries Ltd.
Colonial Pipeline Company
Compagnie Francaise du Carbon Black S.A.
Dixie Pipeline Company
Everglades Pipe Line Company
Explorer Pipeline Company
Gardner Cryogenics Europe N.V.
Insurance and Reinsurance Brokers (Bermuda) Ltd.
Iranian Marine International Oil Company
Kaw Pipe Line Company
Kanai LNG Corporation
LeeFac, Inc.
Negromex S.A.
Nordisk Philblack AB
Norland GmbH
Norpipe A/S
Norpipe Petroleum U.K. Ltd.
Norsea Gas A/S
Norsea Gas GmbH
Norsea Pipeline Ltd.
Papago Chemicals, Inc.
Petrochim
Phillips Carbon Black Company (Pty.) Ltd.
Phillips Carbon Black Italiana S.p.A.
Phillips Carbon Black Limited
Phillips Gas Supply Corporation
Phillips Imperial Petroleum Limited
Phillips Pacific Checmical Company
Phillips Petroleum Singapore Chemicals (Private) Limited
Philmac Oils Limited

Plasticos Vanguardia S.A.
Polar LNG Shipping Corporation
Polyolefins
Powder River Corporation
Renolit Fertighaus GmbH
Seadock, Inc.
Seaway Pipeline, Inc.
Sevalco (Holdings) Limited
Societe De Developpement Des Polyolefins
Transatlantic Reinsurance
Trenwick Ltd.
Western Desert Operating Petroleum Company
White River Shale Oil Corporation

SHELL OIL COMPANY

Subsidiaries

Basin Pipe Line System
Bullenbay Marine Services, N.V.
Business Development Corporation of North Carolina
Butte Pipe Line Company
Capline System
Capwood Pipe Line System
Cortez Capital Corporation
Crown-Shell Baytown Feeder Line System
Curacao Oil Terminal N.V.
Dixie Pipeline Company
East Texas Salt Water Disposal Company
Explorer Pipeline Company
First Harlem Securities Corporation
Gravcap, Inc.
Heat Transfer Research Inc.
Inland Corporation
LOCAP, Inc.
LOOP, Inc.
Oil Companies Institute for Marine Pollution Compensation Limited
Oil Insurance Limited
Olympic Pipe Line Company
Ozark Pipe Line Company
Plantation Pipe Line Company
Rancho Pipe Line System
Royal Dutch Petroleum Company
Seadock, Inc.

Shell Petroleum, N.V.
The "Shell" Transport and Trading Company, Ltd.
Ship Shoal Pipe Line System
Thums Long Beach Company
West Shore Pipe Line Company
Wolverine Pipe Line Company

STANDARD OIL COMPANY (INDIANA)

Subsidiaries and Affiliates

Analog Devices
Chicago Bank of Commerce
Cetus Corporation
Dearborn Park Corporation
Illinois Neighborhood Development Corporation
National Corporation for Housing Partnerships
Semix
Solarex Company

THE STANDARD OIL COMPANY (OHIO)

Subsidiaries and Affiliates

Atlas Supply Company
BP Alaska Inc.
Colonial Pipeline Company
Delaware Bay Transportation Company
Ferix Corporation
Gravcap, Inc.
Inland Corporation
Iricon Agency, Limited
Laurel Pipe Line Company
Miami Valley Corporation
Mid-Valley Pipeline Company
New Seward Inc.
Ress Realty Company
Sohio/BP Trans Alaska Pipeline Capital Inc.
West Texas Gulf Pipe Line Company

**Kennecott Corporation was merged with an indirect wholly-owned subsidiary of The Standard Oil Company (Ohio), such that ownership of all of Kennecott's voting securities became vested in an indirect wholly-owned subsidiary of The Standard Oil Company (Ohio).**

In Addition, British Petroleum, Ltd. has an approximate 53% shareholding in The Standard Oil Company (Ohio).

TEXACO INC.

Subsidiaries and Affiliates

Alberta Products Pipe Line Ltd.
Arabian American Oil Company
Associated Octel Company Limited, The
Aviation Fuel Services Ltd.
Boral Limited
New Zealand Refining Company Limited, The
South Africa Oil Refinery (Proprietary) Ltd.
Batangas Land Company Inc.
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Ndola Oil Storage Company Limited
Central African Petroleum Refineries (Private) Ltd.
East African Oil Refineries Limited
H.C. Sleih Limited
Pakistan Refinery Limited
Societe Malgache de Raffinage
Societe Reunionnaise d'Entroposage (S.R.E.)
Cia. Refinadora Petrolera Santo Domingo Inc.
Deutsche Transalpine Ollejtung GmbH
Forenade Syenska Oljeimportorers AB
Frevlig A.G.
Gas Natural Colombiana S.A.
Ghana Bunkering Services Limited
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Irish Refining Company Limited
Maghreb Gaz S.A.
Mainline Pipelines Limited
Miland Airport Refueling Services, S.p.A. (MARS)
Mitsui-Texaco Chemicals Co., Ltd.
Montreal Pipe Line Company Limited
N.V. Rotterdam Rijn Pijpleiding Maatschappij
Oberheinische Mineralolwerke G.m.b.H.
Pars Investment Corporation
Pipelines of Puerto Rico, Inc., The
Raffinerie du Sud-Quest S.A.
Refinery Services Company S.A.
Rheem del Eduador C.A.
Rhein-Mein Rohrleitungstransportgesellschaft m.b.H.

Saudi International Petroleum Carrier Ltd.
Sierra Leone Petroleum Refining Company Limited, The
Skandinaviska Raffinaderi Aktiebolaget Scanraff
Societa Italiana per l'Oleodotto Transalpino S.p.A.
Societa per Azioni Raffineria Padana Olii Minerali (SARPOM)
Societe Africaine de Raffinage S.A. (SAR)
Societe Anonyme de la Raffinereie des Antilles (SARA)
Societe D'Entreposage de Bobo-Dioulasso
Societe Camerounaise d'Entreposage (SCE)
Societe Dakaroise d'Entreposage S.A. (SDE)
Societe d'Entreposage de San Pedro S.A. (SESP)
Societe d'Entreposage Petrolier au Burundi S.A.R.L. (SEP-BURUNDI)
Societe De Manutention Des Carburants Aviation Dakar Yoff (SMACADY)
Societe Gabonaise de Raffinage (SOGARA)
Societe Gabonaise d'Entreposage du Produits Petroliers S.A. (STEPP)
Societe Togalaise d'Entreposage S.A. (STE)
Svensk Petroleum Forvaltning Aktiebolag
Tankanglage AG Ruemlang (TAR)
Texaco Mexicana, S.A.
Transalpine Finance Holdings S.A.
Transalpine Olleitung in Osterreich GmbH
Trinidad Asphalt Holdings Limited
Trinidad Northern Areas Limited
Trinidad Limited
Trintovac Developments Limited
Refineria Texaco de Honduras, S.A.
Texaco Agro-Industrial (Nigeria) Limited
Texaco Canada Inc.
Public Fuel Transmission Systems Limited
Great Eastern Oil & Import Co. Limited, The
Texaco Norway A/S
Deutsche Texaco Aktiengesellschaft
Texaco Portugal Prospeccaoe Producao, S.A.R.L.
Texaco North Sea Norway A/S
Texaco Gabon
Texaco Togo
Zaire-Texaco S.A.R.L.
Texaco Nigeria Limited
Texaco-Cities Service Pipe Line Company
Tadlaqaz S.A.

American Overseas Petroleum Limited
Bunkerservice Brunsbuttel G.m.b.H.
Societe Ivoirienne De Futs et D'Emballages (SOGUILUBE)(See Texaco Africa Ltd.)
Caltex Petroleum Corporation Austrailian
Lubricating Oil Refinery Limited
Phoenicia Oil Company S.A.L.
Botany Bay Tanker Company (Australia) Pty. Limited
Sydney Metropolitan Pipeline Pty. Limited
Koa Oil Company, Limited
Mediterranean Refining Company
Nippon Petroleum Refining Company, Ltd.
Tokyo Tanker Company, Limited
Caltex Deutschland G.m.b.H.
Caltex Mediterranean Limited
Conda Chemie G.m.b.H.
Federated Pipe Lines Ltd.
Flexibox G.m.b.H.
LPG de Panama, S.A.
Pembroke Capital Company Inc.
P.T. Caltex Pacific Indonesia
Petrogas, S.A.
Texaco Maroc
Societe Ivoirienne D'Avitaillements Portuaires (S.I.A.P.)
Societe Ivoirienne D'Entrepasage De Produits Petroliers (S.I.E.P.P.)
Badger Pipe Line Company
Bayonne Industries, Inc.
Canyon Reef Carriers, Inc.
Colonial Pipeline Company
Coltexo Corporation
Dixie Pipeline Company
Explorer Pipeline Company
Felix Oil Company
Kaw Pipe Line Company
Laurel Pipe Line Company
LOCAP Inc.
LOOP Inc.
Olympic Pipe Line Company
Portland Pipe Line Corporation
Texas-New Mexico Pipe Line Company
THUMS Long Beach Company
West Shore Pipe Line Company
Wolverine Pipe Line Company

Wyco Pipe Line Company
Aircraft Fuel Supply B.V.
Airport Refueling Services S.p.A.
Aktiebolaget Svensk Petroleumlagring
United Kingdom Oil Pipelines Limited
Unterflur Betankungsanlage A.G. (UBAG)
West Australian Natural Gas Pty. Limited
Zaire Services des Entreprises Petrolieres (Zaire S.E.P.)
Aktiebolaget Djurgardsberg
Association Petroliere Belge
Aviation Fueling Services, S.A.
Aviation Service Center
Compagnie Entreposage Communautaire
Singapore Refining Company Private Limited
Societe Belge de Transport Par Pipeline S.A.
Societe de Cabotage Petrolier S.A.
Societe du Pipeline Sud-European S.A.
Societe Nationale de Raffinage
Svensk Petroleumadministration AB
Total Centrafricaine de Gestion
Societe Agricole des Enterprises Petrolieres
Union des Raffineurs Belges
Svensk Petroleumlargring Tre Aktienbolag
Societe Cameranaise des Depots Petroleirs (SCDP)
TNPL
AK Chemie GmbH & Co. KG
Bergemann KG
Braunkohle-Benzin AG
Knoops & Muller Mineralolhandel GmbH
Karlsruhe-Stuttgart Rohrleitung GmbH
Bremer Mineralolhandel GmbH
Dannenberg & Co. Mineralolhandel GmbH
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Boske & Com. Mineralolhandel GmbH
HoeTex Beteiligungsgesellschaft mbH
Bayonne Industries, Inc.
Canyon Reef Carriers, Inc.
Colonial Pipeline Company
Coltexo Corporation
Dixie Pipeline Company
Explorer Pipeline Company
Felix Oil Company
Kaw Pipe Line Company

Laurel Pipe Line Company
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LOOP Inc.
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Texas-New Mexico Pipe Line Company
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Wolverine Pipe Line Company
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Aktiebolaget Svensk Petroleumlargring
United Kingdom Oil Pipelines, Limited
Unterflur Betan Kungsanlage A.G. (UBAG)
West Australian Natural Gas Pty. Limited
Zaire Services des Enterprises Petrolieres (Zaire S.E.P.)
Aktiebolaget Djurgardsberg
Wichmann Beteiligungsgesellschaft mbH
Caluplast Farberfabriken Wichmann
Zerssen Mineralolhandel GmbH & Co. GmbH

UNION OIL COMPANY OF CALIFORNIA

Subsidiaries and Affiliates

Ace Gas, Inc.
Brea Agricultural Service
Cymoly Corporation
Gravity Adjustment, Inc.
Kyung in Energy Company, Limited
Los Angeles Oil Company, Inc.
Miami Valley Corporation
Mid-County Chemical Co.
Midwest PMN, Inc.
Mineral Unionoil Chile Limitada
Duachita Fertilizer Company, Inc.
P-M-S West, Inc.
Sanitation, Inc.
Sepulveda Oil and Gas Company
Southcap Pipe Line Company
Superior Deshler Co.
Union Oil Company of Canada, Ltd.
Unoco (Philippines), Inc.
Van Salt Water Disposal Company

**Corporate Petitioner General Motors Corporation:**

GENERAL MOTORS CORPORATION

All United States and Canadian subsidiaries of General Motors Corporation are wholly owned with the exceptions of: Motor Enterprise, Inc., which is partly owned by the United States Small Business Administration, and GM Fanuc Robotics Corp., which is partly owned by Fanuc Ltd.

**Corporate Petitioner Rubber Manufacturers Association, Inc.**

RUBBER MANUFACTURERS ASSOCIATION, INC.

Affiliates

Natural Rubber Shippers Association, Inc.
Tire Industry Safety Council

SEE COMPANION CASE

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No. 82-1247

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN IRON AND STEEL INSTITUTE, *et al.*,
AMERICAN PETROLEUM INSTITUTE, *et al.*,
CHEMICAL MANUFACTURERS ASSOCIATION,
GENERAL MOTORS CORPORATION, and
RUBBER MANUFACTURERS ASSOCIATION,
*Petitioners,*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
CITIZENS FOR A BETTER ENVIRONMENT, INC.,
AMERICAN LUNG ASSOCIATION OF NORTHWESTERN
OHIO, INC., and ADMINISTRATOR, U.S.
ENVIRONMENTAL PROTECTION AGENCY,
*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

## PETITIONERS' REPLY BRIEF

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May 13, 1983

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1247

AMERICAN IRON AND STEEL INSTITUTE, *et al.*,
AMERICAN PETROLEUM INSTITUTE, *et al.*,
CHEMICAL MANUFACTURERS ASSOCIATION,
GENERAL MOTORS CORPORATION, and
RUBBER MANUFACTURERS ASSOCIATION,
*Petitioners*,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
CITIZENS FOR A BETTER ENVIRONMENT, INC.,
AMERICAN LUNG ASSOCIATION OF NORTHWESTERN
OHIO, INC., and ADMINISTRATOR, U.S.
ENVIRONMENTAL PROTECTION AGENCY,
*Respondents*.

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

## PETITIONERS' REPLY BRIEF

Despite Respondent NRDC's protestations to the contrary, the decision below raises a vital federal question—whether the Clean Air Act prohibits EPA and the states from adopting and applying a plantwide definition of "source" to industrial expansion and modification projects in nonattainment areas. At issue here are regulatory measures affecting plant construction and modification in over 30 of the 50 states. The decision below also conflicts

with two prior decisions of this Court, *Train* v. *NRDC* and *Union Electric Co.* v. *EPA*, which held that EPA *must* approve state plans demonstrating timely attainment of applicable ambient air standards and meeting the enumerated requirements of Section 110(a)(2) of the Act. Finally, the decision below raises an important, generally applicable issue of administrative law—whether an agency must produce greater factual support to justify revision of a rule than that required when adopting it.

### I. The Court Below Has Decided An Important Question Of Federal Law Which Should Be Settled By This Court

The D.C. Circuit has addressed the plantwide source issue[1] in the context of three different Clean Air Act programs with confusing, contradictory results. *See* Chevron Pet. at 7-10; EPA Pet. at 21-23; AISI Pet. at 15-17. In the instant case, the court below did not even purport to decide whether the plantwide definition of "source" should, as a matter of law, be applied to new

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[1] Respondents charge (NRDC Opp. at 4, footnote 8) that AISI "mischaracterizes" the EPA plantwide definition. AISI's "characterization" of the plantwide definition or the "bubble concept" associated with it is not in error. AISI's description of the "netting" aspects of the "bubble concept" is identical to that used by the court of appeals in *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 401-402 (D.C. Cir. 1979). NRDC is confusing the "netting" of emission increases and decreases with EPA's decision to specify "significance levels" below which *de minimis* plant emission increases do not trigger new source review. NRDC's quarrel is with EPA as to whether the significance level amounts listed at page 4, footnote 9 of its Opposition are in fact insignificant. NRDC itself, at page 5, footnote 9 of its Opposition, seriously mischaracterizes EPA's regulations, however, when it erroneously states that the *de minimis* increases can occur many times at a source rather than, as is in fact the case, as a single, cumulative total over a five-year period. *See* Chevron Reply at 4, footnote 1.

source review in nonattainment areas[2] but rather held itself "constrained" to reach the final result based on two prior decisions which do not support that result. Since no other courts of appeals can address this issue[3] and because the D.C. Circuit has declined the opportunity to resolve these inconsistent results, only this Court can untangle the present morass.

Resolution of the source issue is crucial. If the decision below is not reversed, the plans of at least 31 states (over 60% of the country) for the cleanup of nonattainment areas will be overturned. *See* EPA Pet. at 13-14, 21-22. Forcing the states to adopt a "dual" definition of the term "source"[4] will delay plant replacement and modernization

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[2] NRDC consumes twelve pages of its Opposition (at 10-21) defending the decision below on the basis of the Act's legislative history. The court below, however, reviewed this history and the statutory language and concluded that neither "squarely addressed" Congress' view of "stationary source" for purposes of the Part D permit process and construction moratorium. Chev. App. at A-8. NRDC's emphasis on legislative history arguments not relied upon by the court below suggests that NRDC is not comfortable with the "bright line" test announced by that court as the basis for its decision. In fact, neither the statute nor its legislative history requires EPA to adopt a particular definition of "source" and neither precludes EPA from adopting the plantwide definition.

[3] NRDC misleadingly cites two cases, one each in the Fourth and Ninth Circuits, as having "rejected" application of the plantwide definition. NRDC Opp. at 6, footnote 10. At issue in those cases was not the scope nor even the application of the plantwide source definition, but rather the commencement date of construction of new boilers. In any event, both courts lacked jurisdiction to consider the legality of EPA's source definition, an issue left by Section 307(b) of the Clean Air Act to the exclusive purview of the D.C. Circuit.

[4] When the court below struck down the plantwide source definition, it did so by vacating, not remanding, EPA's October 14, 1981 regulations deleting the "dual" source definition which had been in

projects or, where the construction moratorium applies, can preclude modernization altogether, effectively putting the brakes on economic recovery for large industrial sectors of the economy.[5]

### II. The Decision Below Conflicts With Applicable Decisions Of This Court

The decision below requires EPA to disapprove at least 31 state plans demonstrating timely attainment of applicable ambient air standards and meeting the specific requirements of Section 110(a)(2) using the the plantwide definition of source. In contending that the decision below does not conflict with this Court's decisions in *Train* v. *Natural Resources Defense Council*, 421 U.S. 60 (1975), and *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976), which held that state plans meeting the above requirements *must* be approved regardless of the means chosen by the state to achieve attainment, Respondent NRDC mistakenly equates adoption of the plantwide source definition with failure to establish a Section 110(a)(2)(D) new source review program. The two are not equivalent. The plantwide definition affects only the *scope* of a new

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effect since August, 1980. In so doing, the court of appeals apparently intended to reinstate the previous "dual" definition which forced EPA and the states to define a source as a plant *and* each component thereof. *See* Small Refiner Lead Phasedown Task Force v. EPA, ___ F.2d ___, 18 ERC 1681, 1682 (D.C. Cir. 1983) (cites decision below as "implicitly assuming that EPA will return to its previous regulation defining 'source' under the Clean Air Act").

[5] As statistics cited by NRDC clearly show, virtually all major industrial development projects undertaken in nonattainment areas (590 out of 604 such projects—98%—over the five year period between 1976 and 1980) take place at existing plants rather than at wholly new sites. NRDC Opp. at 4, footnote 7.

source review program, not the *existence* of such a program.

Each of the 31 states that has adopted the plantwide definition of source was required to demonstrate to EPA that it has in place a new source review program meeting the requirements of Section 110(a)(2)(D) and Part D. Those states were able to make that showing by demonstrating that they have developed a series of emission reduction strategies designed to achieve applicable ambient standards. None of those demonstrations were dependent upon a new source review program utilizing the "dual" source definition.

### III. The Decision Below Raises A Fundamental Issue Of Administrative Law—Whether An Agency Must Produce More Factual Support To Revise A Rule Than Initially To Adopt It

NRDC mischaracterizes AISI's administrative law argument at 17-19 of AISI's petition as a claim that "the lower court applied an improper standard of review when it failed to defer to EPA's reversal of position on a factual assertion . . ." NRDC Opp. at 9. NRDC misses the point entirely. Both EPA's August 7, 1980 "dual" definition of "source" and its October 14, 1981 plantwide "source" definition were based on policy considerations, not factual studies.[6] The lower court objected to what it perceived to

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[6] In its March 12, 1981 *Federal Register* proposal, EPA cited seven reasons for deleting the dual definition, one of which was the modernization disincentive factual assertion noted by NRDC. 46 Fed. Reg. 16281. In its October 14, 1981 promulgation, however, EPA itself dismissed this consideration as "speculative" (*see* AISI Petition, App. 27a) and instead cited two policy-related concerns for adopting the plantwide definition: (1) to eliminate confusion and promote regulatory simplicity by adopting the same definition of

be EPA's lack of factual support for amending the "source" definition, despite the complete absence of factual support for the original "dual" definition.[7]

AISI does not contend and has never contended that courts must "defer" to unsubstantiated "factual assertions" made by administrative agencies. AISI does contend, however, that where, as here, EPA acknowledges that its prior policy judgment was incorrect and, with a full explanation supported by extensive public comments, rationally determines that a different policy better implements Part D, deference should be accorded to the Agency. By requiring more, the court below impermissibly imposed procedural obligations on the Agency. *See Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 548 (1978).

An agency revision or rescission of policy should not be subjected to a harsher standard than that accorded the original exercise of the Agency's policy judgment. If anything, greater deference should be given to the agency's subsequent decision, which reflects accumulated knowledge and experience gained from implementing the initial decision. The heavy burden imposed by the court below prevents agencies from benefiting from their experience

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source for both the PSD and the nonattainment programs, and (2) to allow states to play their proper primary role in controlling pollution within state boundaries by giving them flexibility in developing their nonattainment area new source review programs and attainment demonstrations. AISI Petition, App. 23a-24a.

[7] In fact, EPA received public comment on the "source" definition on three separate occasions. 44 Fed. Reg. 3274 (Jan. 16, 1979), 44 Fed. Reg. 51924 (Sept. 5, 1979), and 46 Fed. Reg. 16280 (March 12, 1981). The overwhelming majority of commentators, including states, each time supported the plantwide source definition.

in administering regulations and correcting their mistakes.

### IV. The Possibility That Congress Might Amend The Clean Air Act Is No Basis For Denying Review Of The Decision Below

NRDC suggests that, because the Congress may while reviewing and reauthorizing the Clean Air Act amend that Act, review by this Court is unnecessary. The principle asserted by NRDC—that parties aggrieved by a lower court decision should be denied access to this Court if the statute in question is subject to amendment—is fundamentally unsound. Any federal statute may be amended by the Congress. This possibility is pure speculation[8] and provides no basis for precluding aggrieved parties from obtaining redress from this Court.

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[8] The fact that the Congress is considering amendments to the Clean Air Act is no guarantee that such amendments will be enacted or that any amendments which may be enacted will include a definition of "source" specifically applicable to the nonattainment program. The Clean Air Act has been up for reauthorization the last two sessions of Congress and no new legislation has resulted from either session.

## CONCLUSION

For the foregoing reasons, in addition to those stated in the original petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 82-1247-CFX
Status: GRANTED

Title: American Iron and Steel Institute, et al., Petitioners
v.
Natural Resources Defense Council, Inc., et al.

Docketed:
January 25, 1983

Court: United States Court of Appeals for the District of Columbia Circuit

Vide:
82-1005
82-1591

Counsel for petitioner: Emmett, Robert A., Salinsky, Michael H.

Counsel for respondent: Solicitor General, Doniger, David D.

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Jan 25 1983 | G | Petition for writ of certiorari filed. |
| 3 | Apr 20 1983 | | Order extending time to file response to petition until April 29, 1983. |
| 4 | Apr 29 1983 | | Brief of respondent NRDC, et al. in opposition filed. VIDED. |
| 5 | May 4 1983 | | DISTRIBUTED. May 19, 1983 |
| 6 | Mar 28 1983 | G | Motion of Mid-America Legal Foundation for leave to file a brief as amicus curiae filed. |
| 7 | May 13 1983 | X | Reply brief of petitioner Am. Iron & Steel, et al. filed. |
| 10 | May 23 1983 | | REDISTRIBUTED. May 26, 1983 |
| 11 | May 31 1983 | | Motion of Mid-America Legal Foundation for leave to file a brief as amicus curiae GRANTED. |
| 12 | May 31 1983 | | Petition GRANTED. This case is consolidated with case Nos. 82-1005 and 82-1591, and a total of one hour is allotted for oral argument. |
| | | | ********** |
| 14 | Jul 8 1983 | | Order extending time to file brief of petitioner on the merits until August 15, 1983. |
| 15 | Jul 28 1983 | | Order further extending time to file brief of petitioner on the merits until August 31, 1983. |
| 16 | Aug 17 1983 | | Brief of petitioner Chevron U.S.A., Inc. filed. VIDED. |
| 17 | Aug 30 1983 | | Joint appendix filed. VIDED. |
| 18 | Aug 29 1983 | | Brief amicus curiae of Pacific Legal Foundation filed. VIDED. |
| 19 | Aug 31 1983 | | Brief of petitioners American Iron and Steel Institute, et al. filed. VIDED. |
| 20 | Aug 31 1983 | | Brief of respondent Administrator of the EPA filed. VIDED. |
| 21 | Sep 7 1983 | | Brief amicus curiae of Mid-America Legal Foundation filed. VIDED. |
| 23 | Sep 13 1983 | | Certified record (Box) received. |
| 24 | Sep 13 1983 | | Record filed. |
| 26 | Sep 15 1983 | | Order extending time to file brief of responcent on the merits until October 21, 1983. |
| 27 | Oct 18 1983 | | Order further extending time to file brief of respondent on the merits until October 28, 1983. |
| 28 | Oct 21 1983 | G | Motion of United Steelworkers of America, AFL-CIC-CLC, for leave to file a brief as amicus curiae filed. |
| 29 | Oct 31 1983 | | Motion of United Steelworkers of America, AFL-CIC-CLC, for leave to file a brief as amicus curiae GRANTED. |
| 30 | Oct 28 1983 | | Brief of respondents NRDC, et al. filed. VIDED. |
| 31 | Oct 28 1983 | | Brief amicus curiae of Pennslyvania, et al. filed. VIDED. |

No. 82-1247-CFX

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 32 | Jan 9 1984 | | SET FOR ARGUMENT. Wednesday, February 29, 1984. This case is consolidated with Nos. 82-1005 & 1591. (4th case) |
| 33 | Jan 11 1984 | | CIRCULATED. |
| 34 | Feb 17 1984 | X | Reply brief of petitioner EPA filed. VIDED. |
| 35 | Feb 18 1984 | X | Reply brief of petitioner Chevron U.S.A., Inc. filed. VIDED. |
| 36 | Feb 22 1984 | | Reply brief of petitioners Am. Iron & Steel, et al. filed. VIDED. |
| 37 | Feb 29 1984 | | ARGUED. |